The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor

HIGH COURT (KOTA KINABALU) — SUIT NO 351 OF 1979
IAN CHIN J
6 SEPTEMBER 1999

Equity *— Fraud in equity — Fiduciary relationship — Conflict of interests — Use of opportunity and knowledge acquired as fiduciary agent for own profit — Whether fraudulently concealed from trustess of principal licence given to company — Failure to disclose control and financial interest in company — Whether entitled to restitutionary remedy and compensatory relief*

Equity *— Fraud in equity — Fiduciary relationship — Conflict of interests — Use of opportunity and knowledge acquired as fiduciary agent to commit principal to implement projects for own benefit — Failure to disclose personal interest in projects — Whether dishonest and improper motive proved*

In Civil Suit No 352, the plaintiffs were the Sabah Foundation ('Sabah Foundation') and Seranum Sdn Bhd ('Seranum'). The defendants were Datuk Syed Kechik bin Syed Mohamed ('DSK') and Banita Sdn Bhd ('Banita'). In 1965, DSK was sent by the Federal Government to Sabah to be the political and legal advisor of Tun Mustapha ('TM'). TM was later appointed as the Chief Minister cum Minister of Natural Resources of Sabah. The Sabah Foundation Enactment (No 8) 1966, setting up the Sabah Foundation, was passed and came into force on 10 May 1966 with TM as the first chairman. On 15 June 1967, DSK was appointed its first director and also a trustee as from 7 September 1975. The Enactment was in 1967 amended to allow Sabah Foundation to apply for and extract timber. Seranum was incorporated in 1974 and was regarded as a subsidiary of Sabah Foundation and DSK was at all material time its director. Syed Salam Albukhari ('SSA'), the brother of DSK, assisted DSK in some of the affairs of the government, the Sabah Foundation and Seranum. In 1969, a Cabinet Paper was prepared dealing with forest policy on long term timber concessions and it proposed the taking back of areas reserved for the concessionaires. One of these concessionaires was Wallace Bay Sdn Bhd ('Wallace Bay'). DSK was then appointed as the chairman of a negotiating team to negotiate on behalf of the government with the 12 concessionaires the taking back of the balance of the areas reserved for them. By an agreement made on 17 April 1974, Wallace Bay surrendered 15% of its concession to the government and provision was made for the boundaries and area to be determined and agreed. The area came out to be 39.625 sq miles. On 29 July 1974, Banita applied for the special timber licence to work an area of approximately 39.625 sq miles of the Wallace Bay concession area and constituting the management area to be returned to the government. DSK was at all material time directly or indirectly in control of Banita and was also its directing mind. DSK reported to the Secretary of Natural Resources that the total area constituting the 15% of the areas to be taken back from the 12 concessionaires amounted to 241.562 sq miles of which Wallace Bay area accounted for the said 39.625 sq miles. The Secretary of Natural Resources recommended the approval of 201.937 sq miles of the 241.562 sq miles, ie 39.625 sq miles less, to Sabah Foundation for the purpose of generating fund towards the erection of sports complexes and stadium. On 1 April 1975, licences were issued respectively to Banita for 339.625 sq miles and to Seranum for 142.362 sq miles instead of 201.937 sq miles. It is not disputed that DSK did not offer the opportunity of applying for the licence he eventually secured in Banita's name to Seranum nor did he draw such opportunity to the attention of the Board of Trustees of the Sabah Foundation. On 12 June 1975, an agreement was executed between the government and Seranum whereby Seranum was appointed as the contractor to carrry out the construction of the stadium and sport complexes and Seranum would obtain a remuneration of 10%. On 15 April 1976, the government headed by TM was voted out of office. DSK resigned as Director of Sabah Foundation. The timber licence of Banita was cancelled by the government on 6 August 1976. The plaintiffs alleged that DSK was guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty as director and subsequently trustee of Sabah Foundation and as managing director of Seranum in that: (i) he failed in his entrusted duty to cause the whole of the surrendered area to be given to Sabah Foundation or Seranum; (ii) he made use of the opportunity and knowledge acquired by him as fiduciary agent of the plaintiffs to make profit for himself and Banita to the detriment of Sabah Foundation; and (iii) he fraudulently concealed from the trustess of Sabah Foundation and Board of Directors of Seranum the fact Banita had applied for and been granted a licence over the Wallace Bay area and he failed to disclose his control and financial interest in Banita.

In Civil Suit No 351, the plaintiffs were the same Sabah Foundation and Seranum but with the addition of Sinsuran Sdn Bhd ('Sinsuran') while the defendants were DSK and Zara Sdn Bhd ('Zara'). DSK was at all material time in control and had substantial direct or indirect beneficial interest in Zara and was its directing mind. The plaintiffs alleged that DSK was guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty as director and subsequently as trustee of Sabah Foundation and as managing director of both Seranum and Sinsuran in that: (i) he made use of the opportunity and knowledge acquired by him as their fiduciary agent to commit the plaintiffs to implement two projects, viz: (a) the building of Sabah Foundation Tower ('the Tower'); and (b) the construction of a coastal highway for his own or primarily for his own benefit and not bona fide in the interest of the plaintiffs; (ii) the sole and primary purpose of DSK in so committing the plaintiffs was to enhance the value of Zara land for the benefits of the defendants by providing Zara land with amenities and prestige focal point and by substantially improving the access and approaches to Zara land; (ii) he so committed the plaintiffs without the authority or knowledge of the Board of Directors of Seranum and Sinsuran; and (iv) he failed to disclose to the Board of Trustees or the Board of Director his own personal interest in the projects. That DSK was a fiduciary who owed Sabah Foundation, Seranum and Sinsuran duties was not disputed. What was disputed was whether DSK took those actions or decisions and if he did whether those actions or decisions were taken for the sole or primary purpose of benefiting DSK or Zara and whether they amounted to a breach of fiduciary duty. It was also an issue whether by those actions or decisions, if found to have been taken, DSK was guilty of a fraudulent and dishonest design.

Held, allowing the plaintiffs' claims in both suits:

(1) The plaintiffs' case was dependent on establishing that the Wallace Bay area was earmarked for Sabah Foundation. The government had intended that the areas to be taken back from the 12 concessionaires including Wallace Bay area be given to Sabah Foundation. That intention was expressed in the two letters dated 5 January and 18 March 1974 respectively. Both letters talked of the area taken back to 'be given' to Sabah Foundation or its group for them 'to work the area and utilize the profits so generated to build stadium and sports complexes in every major town in the state'. Going by those terms of the letters, there could be no clearer indication than that as regards the intention of the Sabah state government to give the Wallace Bay area to Sabah Foundation or its group (see p 524E–H).

(2) The evidence of SSA could not be evidence that TM had suggested the application of the licence by Banita. He was not present when TM had allegedly said to DSK that the area be gifted to DSK or his nominee. SSA was told so by DSK. It was hearsay if that evidence was sought to establish the fact of TM having made the gift. In so far as reliance was placed on this hearsay as supporting the defence that TM had 'gifted' the area to Banita which it had applied for, it must necessarily fail. DSK and TM did not testify and both could not do so, the former on account of infirmity and the latter had since demised. In any event, the court did not find SSA a credible witness (see p 514D–F).

(3) There was no doubt that DSK owed fiduciary duties to Sabah Foundation and Seranum, being respectively the director and managing director. DSK was a fiduciary. Those positions were well recognized as giving rise to a fiduciary relationship. But it did not mean that anything he did which may be a breach of duty amounted to a breach of fiduciary duty. Therefore, the mere fact that DSK was respectively the director and managing director of Sabah Foundation and Seranum did not mean that every duty of his was of a fiduciary nature. What must be determined was the obligations DSK owed as a fiduciary and in what respect he had failed to discharge those obligations (see pp 530H, 531B, F–G).

(4) The obligations of DSK were to be determined in relation to the areas of 12 concessionaires and more particularly the Wallace Bay area. As soon as the government had evinced its intention

through the cabinet decision and letters to give to Sabah Foundation or its group those areas, DSK would be expected to protect that interest or expectation. Any action on his part which had the result of reducing the size of the area to be given to Sabah Foundation or its group was clearly a breach of his fiduciary duty to protect the interest of Sabah Foundation or its group. As soon as the Wallace Bay area was given to Banita instead of Sabah Foundation or its group, that completed the breach of duty on the part of DSK (see pp 531H, 532A–C).

(5) It was difficult to see, given the scope of DSK's duties as the director and managing director respectively of Sabah Foundation and Seranum, how the act of the Wallace Bay area being shanghaied by Banita could be anything but the result of a breach of fiduciary duty on the part of DSK. Therefore, the plaintiffs had established that DSK had failed in his duty to cause the whole of the surrendered area to be given to Sabah Foundation or Seranum. The facts of the present case satisfied the tests which evolved from the three rules governing a trustee, viz: (i) the no profit rule; (ii) the no conflict rule; and (iii) the misuse of trust knowledge rule. Firstly, DSK had obtained benefit by reason and in the course of his office as a director. Secondly, by submitting the application for the licence which evinced his interest in the Wallace Bay area, DSK was in actual conflict with the interest of Sabah Foundation. Thirdly, right from the beginning DSK was made aware that the areas to be taken back from the 12 concessionaires were for the purposes of Sabah Foundation and any information relating to those areas was trust information (see pp 533H–534B, 539B, 540F).

(6) It was impossible not to conclude in this case that the Wallace Bay area and its timber licence came from or by reason or by means of the fiduciary position of DSK. The causal relationship between the act of DSK or Banita and the loss of the Wallace Bay by Sabah Foundation was established. Thus, the plaintiffs were entitled to restitutionary remedy, ie accounting to Sabah Foundation and Seranum the profit derived from the Wallace Bay area; and compensatory relief, ie the loss consequent upon the cancellation of the licence (see pp 542C–E, 547F–G).

(7) Even assuming it was in December 1973 that TM decided that the Tower should be sited on Zara land as contended by the defendants, it was still Zara's decision since it was the owner of the land and since DSK was also the directing mind and will of Zara. Therefore, whatever role TM may have played in siting the building on Zara land, it was nevertheless the decision of DSK and also that of Zara because ultimately DSK put his signature to the relevant documents which made it possible for the Tower to be constructed on Zara land and it was done without reference to the Board of Trustees. Given the circumstances, it was DSK's decision to build the Tower and have it sited on Zara land (see pp 555G–556A).

(8) In the process of making all those decisions relating to the construction of the coastal highway, DSK never declared his interest in Zara. There was also no record to show that the Board of Trustees of Sabah Foundation had agreed to construct such a road. Because the construction of the coastal highway benefited Zara project with no detrimental effect, it provided the clearest indication that DSK desired it and thus he either made or caused the decision to be made to have the coastal highway built. It was beyond doubt that he decided on it if his influence, power, manipulations and if the trust by TM in him were also taken into account (see p 563G–I).

(9) The court accepted the evidence that the construction of the Tower and the coastal highway had enhanced the value of Zara land (see p 564F–G).

(10) It was not difficult to see that DSK was in a position where his duty to Sabah Foundation, Seranum and Sinsuran conflicted with his interest in Zara. On the one hand, he had to protect and promote the interest of Zara by making sure that whatever actions to be taken on behalf of the Sabah Foundation and its subsidiaries must benefit Zara while, on the other hand, he must also act to protect the interest of Sabah Foundation or its subsidiaries to ensure that their interests were protected and promoted (see p 572A–B).

(11) The decision to have the Tower built alone was not sufficient evidence of any improper motive. The court accepted the evidence that there was no general market for such office space and so a consideration of lettability may not be appropriate. Though the two projects being planned after the conception of Zara project and they benefited Zara project may raise suspicion as to the real motive behind such a project, the court was not inclined to conclude on mere suspicion that the dominant purpose of the two projects was to benefit Zara. Unless the two projects were so totally useless or near totally useless, the court was unable to infer the dominant improper motive urged by the plaintiffs. There was not enough evidence for the court to draw such a conclusion (see p 572G–I).

(12) Though the Tower was intended to be a magnet to draw either business or people to Zara land, it was also intended to be a prestigious project for Sabah Foundation and also to provide space for its subsidiaries. As it was not entirely, though predominantly, for the purpose of Zara, the court was not inclined to hold that it was evidence of dishonesty on that account. The fact that DSK was a barrister, that he did not secure informed consent, that he did not disclose his interest in Zara and that he knew of the conflict of interest was nothing more than elements that went towards establishing a breach of fiduciary duty. These were not evidence of dishonesty. From the evidence, it could not be said that DSK had so completely disregarded the interest of Sabah Foundation and its subsidiaries

that his conduct could be described as dishonest. It was just that it suited more of the purposes of Zara to have the Tower and the coastal highway built and DSK being in a position of conflict as he had rendered his decisions a breach of his fiduciary duties (see pp 573G–574B). A

(13) Since there was no dishonesty and the improper dominant motive had not been proven, the appropriate remedy in this case would be the disgorgement of the profit and that was the value of the improvement to Zara land (see p 574G). B

[Bahasa Malaysia summary

Di dalam Guaman Sivil No 352, plaintif merupakan Yayasan Sabah ('Yayasan Sabah') dan Seranum Sdn Bhd ('Seranum'). Defendan-defendan adalah Datuk Syed Kechik bin Syed Mohamed ('DSK') dan Banita Sdn Bhd ('Banita'). Pada tahun 1965, DSK telah dihantar oleh Kerajaan Persekutuan ke Sabah untuk menjadi penasihat undang-undang dan politik kepada Tun Mustapha ('TM'). TM kemudiannya telah dilantik sebagai Ketua Menteri merangkap Menteri Sumber Alam Semula Jadi Sabah. Enakmen Yayasan Sabah (No 8) 1966, yang menubuhkan Yayasan Sabah, telah diluluskan dan mula berkuat kuasa pada 10 Mei 1966 dengan TM sebagai pengerusinya yang pertama. Pada 15 Jun 1967, DSK telah dilantik sebagai pengarah yang pertama dan juga sebagai seorang pemegang amanah bermula pada 7 September 1975. Enakmen ini telah dipinda pada tahun 1967 bagi membenarkan Yayasan Sabah memohon untuk dan mengekstrak kayu balak. Seranum telah ditubuhkan pada tahun 1974 dan telah dianggap sebagai subsidiari Yayasan Sabah dan DSK pada setiap masa material merupakan pengarahnya. Syed Salam Albukhari ('SSA'), abang kepada DSK, telah membantu DSK di dalam beberapa urusan-urusan kerajaan, Yayasan Sabah dan Seranum. Pada tahun 1969, suatu Kertas Kabinet telah disediakan membincangkan polisi perhutanan mengenai konsesi-konsesi kayu balak tempoh jangka panjang dan ia telah mencadangkan pengambilan semula kawasan-kawasan yang direzabkan untuk pemegang-pemegang konsesi itu. Salah satu daripada pemegang-pemegang konsesi tersebut adalah Wallace Bay Sdn Bhd ('Wallace Bay'). DSK telah kemudiannya dilantik sebagai pengerusi kepada suatu pasukan perundingan untuk merundingkan bagi pihak kerajaan bersama 12 pemegang-pemegang konsesi mengenai pengambilan semula baki kawasan-kawasan yang direzabkan untuk mereka. Melalui suatu perjanjian pada 17 April 1974, Wallace Bay telah menyerahkan 15% daripada konsesinya kepada kerajaan dan peruntukan telah dibuat terhadap sempadan-sempadan dan kawasan yang akan ditentukan dan dipersetujui. Kawasan tersebut telah menjangkau 39.625 batu per segi. Pada 29 Julai 1974, Banita telah memohon untuk suatu lesen pembalakan khas untuk mengerjakan suatu kawasan sebesar lebih kurang 39.625 batu per segi daripada kawasan konsesi Wallace Bay dan memperuntukkan pengurusan kawasan itu diserahkan kembali kepada kerajaan. DSK pada setiap masa material telah secara

C D E F G H I

A langsung atau tidak langsung mempunyai kuasa ke atas Banita dan juga haluan fikirannya. DSK telah melaporkan kepada Setiausaha Sumber Alam Semula Jadi bahawa keseluruhan kawasan yang membentuk 15% daripada kawasan-kawasan itu yang diambil semula daripada 12 pemegang-pemegang konsesi itu berjumlah 241.562 batu per segi di mana kawasan Wallace Bay merupakan 39.625 batu per B segi seperti yang telah diperuntukkan. Setiausaha Sumber Alam Semula Jadi telah mengesyorkan kebenaran ke atas 201.937 batu per segi daripada 241.562 batu per segi, ie kurang 39.625 batu per segi, kepada Yayasan Sabah bagi tujuan mewujudkan dana untuk mendirikan kompleks-kompleks sukan dan stadium. Pada 1 April C 1975, lesen-lesen telah dikeluarkan masing-masing kepada Banita untuk 339.625 batu per segi dan Seranum untuk 142.362 batu per segi dan bukan 201.937 batu per segi. Tiada pertikaian bahawa DSK tidak menawarkan peluang untuk memohon lesen yang beliau akhirnya perolehi di dalam nama Banita kepada Seranum mahupun beliau telah membawa peluang itu kepada perhatian Lembaga D Pemegang-Pemegang Amanah Yayasan Sabah. Pada 12 Jun 1975, suatu perjanjian telah disempurnakan antara kerajaan dan Seranum di mana Seranum telah dilantik sebagai kontraktor untuk menjalankan pembinaan kompleks-kompleks sukan dan stadium dan Seranum akan memperoleh ganjaran sebanyak 10%. Pada 15 April 1976, kerajaan yang diketuai oleh TM telah disingkir daripada jawatan. E DSK telah meletakkan jawatan sebagai Pengarah Yayasan Sabah. Lesen pembalakan Banita telah dibatalkan oleh kerajaan pada 6 Ogos 1976. Plaintif-plaintif telah mendakwa bahawa DSK bersalah terhadap tujuan yang salah nyata dan tidak jujur dan bertindak melanggar kewajipan fidusiari beliau sebagai pengarah dan selanjutnya pemegang amanah Yayasan Sabah dan sebagai pengarah F urusan Seranum, atas sebab: (i) beliau telah gagal mengamanahkan kewajipan beliau untuk menyebabkan keseluruhan kawasan yang diserahkan itu diberikan kepada Yayasan Sabah atau Seranum; (ii) beliau telah mempergunakan peluang dan pengetahuan yang diperolehi oleh beliau sebagai ejen fidusiari kepada plaintif-plaintif G untuk membuat keuntungan bagi dirinya sendiri dan Banita sehingga menjejaskan kedudukan Yayasan Sabah; dan (iii) beliau telah menyembunyikan daripada pemegang-pemegang amanah Yayasan Sabah dan Lembaga Pengarah Seranum tentang fakta Banita telah memohon untuk dan telah diberikan lesen ke atas kawasan Wallace Bay dan beliau telah gagal untuk mendedahkan kuasa dan H kepentingan kewangan beliau di dalam Banita.

Di dalam Guaman Sivil No 351, plaintif-plaintif merupakan Yayasan Sabah dan Seranum yang sama tetapi dengan tambahan Sinsuran Sdn Bhd ('Sinsuran') sementara defendan-defendan adalah DSK dan Zara Sdn Bhd ('Zara'). DSK telah pada setiap masa I mempunyai kuasa dan memperoleh kepentingan faedah secara langsung dan tidak langsung yang cukup banyak di dalam Zara dan merupakan haluan fikirannya. Plaintif-plaintif mendakwa bahawa DSK bersalah terhadap tujuan yang salah nyata dan tidak jujur dan bertindak melanggar kewajipan fidusiari beliau sebagai pengarah dan selanjutnya pemegang amanah Yayasan Sabah dan sebagai pengarah urusan bagi kedua-dua Seranum dan Sinsuran, atas sebab: (i) beliau telah mempergunakan peluang dan pengetahuan yang diperolehi oleh beliau sebagai ejen fidusiari untuk mengikat plaintif-plaintif melaksanakan dua projek, yakni: (a) pembinaan Menara Yayasan Sabah ('Menara itu'); dan (b) pembinaan lebuh raya persisiran pantai untuk kegunaan beliau sendiri atau terutamanya untuk faedah beliau sendiri dan bukan untuk kepentingan plaintif-plaintif; (ii) satu-satunya tujuan utama DSK mengikat plaintif-plaintif adalah untuk menambahkan nilai tanah Zara untuk faedah-faedah defendan-defendan dengan memberikan tanah Zara kemudahan-kemudahan dan titik fokus berprestij dan memperbaiki sebahagian besar jalan-jalan masuk ke tanah Zara; (iii) beliau telah mengikat plaintif-plaintif tanpa kuasa atau pengetahuan Lembaga Pengarah Seranum dan Sinsuran; dan (iv) beliau telah gagal untuk mendedahkan kepada Lembaga Pemegang-Pemegang Amanah dan Lembaga Pengarah tentang kepentingan peribadi beliau sendiri di dalam projek-projek itu. Bahawa DSK merupakan seorang fidusiari yang mempunyai tanggungjawab kepada Yayasan Sabah, Seranum dan Sinsuran adalah tidak dipertikaikan. Apa yang dipertikaikan adalah sama ada DSK telah mengambil tindakan-tindakan atau keputusan-keputusan tersebut dan sekiranya beliau telah berbuat demikian sama ada DSK telah mengambil tindakan-tindakan atau keputusan-keputusan atau tujuan utama tersebut untuk mendatangkan faedah kepada DSK atau Zara dan sama ada semua ini dianggap sebagai suatu pelanggaran kewajipan fidusiari. Adalah juga merupakan satu isu sama ada melalui tindakan-tindakan atau keputusan-keputusan tersebut, jika didapati telahpun diambil, DSK adalah bersalah kerana mempunyai tujuan yang salah nyata dan tidak jujur.

Diputuskan, membenarkan tuntutan-tuntutan plaintif-plaintif di dalam kedua-dua tindakan guaman:

(1) Kes plaintif-plaintif bergantung kepada pembuktian bahawa kawasan Wallace Bay telah diuntukkan bagi Yayasan Sabah. Kerajaan telah bertujuan agar kawasan-kawasan tersebut diambil semula daripada 12 pemegang amanah itu termasuklah kawasan Wallace Bay dan diberikan kepada Yayasan Sabah. Tujuan tersebut telah dinyatakan di dalam dua pucuk surat masing-masing bertarikh 5 Januari dan 18 Mac 1974. Kedua-dua pucuk surat itu menerangkan tentang kawasan yang diambil semula untuk 'diberikan' kepada Yayasan Sabah atau kumpulannya bagi 'mengerjakan kawasan itu dan menggunakan keuntungan yang wujud untuk membina stadium dan kompleks-kompleks sukan di setiap bandar utama dalam negeri'. Dengan mengikut terma-terma di dalam surat-surat itu, tidak mungkin ada tanda yang lebih jelas daripada itu berhubung dengan tujuan kerajaan negeri Sabah untuk memberikan kawasan Wallace Bay itu kepada Yayasan Sabah atau kumpulannya (lihat ms 524E – H).

(2) Keterangan SSA tidak boleh dijadikan sebagai keterangan bahawa TM telah mencadangkan permohonan lesen oleh Banita. Beliau tidak hadir semasa TM telah didakwa berkata kepada DSK bahawa kawasan itu dihadiahkan kepada DSK atau calon beliau. SSA telah diberitahu sedemikian oleh DSK. Ia merupakan suatu dengar cakap jika keterangan itu bertujuan untuk membuktikan fakta TM telah memberikan hadiah itu. Sejauhmana kebergantungan dengar cakap ini diletakkan sebagai menyokong pembelaan bahawa TM telah 'menghadiahkan' kawasan itu kepada Banita yang telah dipohon olehnya, ia semestinya gagal. DSK dan TM tidak memberikan keterangan dan kedua-duanya tidak boleh berbuat demikian, di mana yang pertama telah dianggap tidak berupaya dan yang kedua telahpun meninggal dunia. Di dalam apa-apa keadaan pun, mahkamah tidak mendapati SSA sebagai seorang saksi yang boleh dipercayai (lihat ms 514D–F).

(3) Tiada sebarang keraguan bahawa DSK mempunyai kewajipan-kewajipan fidusiari kepada Yayasan Sabah dan Seranum, masing-masing sebagi seorang pengarah dan pengarah urusan. DSK merupakan seorang fidusiari. Kedudukan-kedudukan tersebut amat dikenali sebagai wujudnya suatu hubungan fidusiari. Tetapi ia tidak bermakna bahawa apa-apa yang dilakukan oleh beliau yang mungkin suatu pelanggaran kewajipan fidusiari akan dianggap sebgai suatu pelanggaran kewajipan fidusiari. Oleh itu, dengan hanya fakta bahawa DSK merupakan masing-masing sebagai pengarah dan pengarah urusan Yayasan Sabah dan Seranum tidak bermakna bahawa setiap kewajipan beliau berbentuk fidusiari. Apa yang perlu ditentukan adalah tanggungjawab-tanggungjawab DSK yang ditanggung oleh DSK sebagai seorang fidusiari dan dalam hal apa beliau telah gagal untuk melaksanakan tanggungjawab-tanggungjawab tersebut (lihat ms 530H, 531B, F–G).

(4) Tanggungjawab-tanggungjawab DSK telah ditentukan berhubung dengan kawasan-kawasan 12 pemegang-pemegang amanah dan terutamanya kawasan Wallace Bay. Sebaik sahaja kerajaan telah menampakkan tujuannya melalui keputusan kabinet dan surat-surat untuk menerikan kepada Yayasan Sabah atau kumpulannya kawasan-kawasan itu, DSK akan diharapkan untuk melindungi kepentingan dan harapan itu. Apa-apa tindakan di pihaknya yang telah mengakibatkan pengecilan saiz kawasan yang akan diberikan kepada Yayasan Sabah atau kumpulannya dengan jelas merupakan pelanggaran kewajipan fidusiari beliau untuk melindungi kepentingan Yayasan Sabah atau kumpulannya. Sebaik sahaja kawasan Wallace Bay diberikan kepada Banita dan bukan kepada Yayasan Sabah atau kumpulannya, maka dengan itulah telah melengkapkan pelanggaran kewajipan di pihak DSK (lihat ms 531H, 532A–C).

(5) Adalah sukar untuk melihat, dengan mengambilkira skop kewajipan-kewajipan DSK sebagai seorang pengarah dan

pengarah urusan masing-masing kepada Yayasan Sabah dan Seranum, bagaimana tindakan kawasan Wallace Bay telah dishanghaikan oleh Banita boleh menjadi selain daripada akibat pelanggaran kewajipan fidusiari di pihak DSK. Oleh itu, plaintif-plaintif telah membuktikan bahawa DSK telah gagal di dalam kewajipan beliau untuk menyebabkan keseluruhan kawasan yang diambil semula itu diberikan kepada Yayasan Sabah atau Seranum. Fakta-fakta kes ini telah memenuhi ujian-ujian yang berkembang daripada tiga peraturan yang mempengaruhi seorang pemegang amanah, yakni: (i) peraturan tiada keuntungan; (ii) peraturan tiada konflik; dan (iii) peraturan salah guna pengetahuan amanah. Pertama, DSK telah memperoleh faedah disebabkan dan di sepanjang tempoh perkhidmatan beliau sebagai seorang pengarah. Kedua, dengan mengemukakan permohonan untuk mendapatkan lesen yang memperlihatkan kepentingan beliau di dalam kawasan Wallace Bay, DSK berada di dalam konflik sebenar dengan kepentingan Yayasan Sabah. Ketiga, sejak dari mula DSK telah diberitahu bahawa kawasan-kawasan yang akan diambil semula daripada 12 pemegang-pemegang amanah itu adalah bagi tujuan-tujuan Yayasan Sabah dan apa-apa maklumat berhubung dengan kawasan-kawasan tersebut merupakan maklumat amanah (lihat ms 533H–534B, 539B, 540F).

(6) Adalah mustahil untuk tidak membuat kesimpulan bahawa kawasan Wallace Bay dan lesen pembalakannya wujud daripada atau disebabkan atau melalui kedudukan fidusiari DSK. Hubungan sebab akibat antara tindakan DSK atau Banita dan kerugian Wallace Bay oleh Yayasan Sabah telah dibuktikan. Oleh itu plaintif-plaintif layak uantuk mendapatkan remedi restitusi, ie dengan mengambilkira keuntungan Yayasan Sabah dan Seranum yang diperoleh daripada kawasan Wallace Bay; dan relif pampasan, ie kerugian akibat daripada pembatalan lesen itu (lihat ms 542C–E, 547F–G).

(7) Dengan membuat anggapan sekalipun bahawa di dalam bulan Disember 1973 TM telah membuat keputusan bahawa Menara itu sepatutnya diletakkan di atas tanah Zara sepertimana yang ditegaskan oleh defendan-defendan, ia masih merupakan keputusan Zara memandangkan ia adalah tuan punya tanah dan memandangkan DSK juga adalah haluan fikiran dan kekuatan Zara. Oleh itu, apa sekalipun peranan yang dimainkan oleh TM dengan meletakkan bangunan itu di atas tanah Zara, namun begitu adalah keputusan DSK dan juga Zara kerana akhirnya DSK telah menandatnagani dokumen-dokumen relevan yang membolehkan Menara itu dibina di atas tanah Zara dan ia telah dilakukan tanpa merujuk kepada Lembaga Pemegang-Pemegang Amanah. Dengan mengambilkira keadaan-keadaan ini, adalah keputusan DSK untuk membina Menara itu dan meletakkannya di atas tanah Zara (lihat ms 555G–556A).

(8) Di dalam proses membuat semua keputusan-keputusan berhubung dengan lebuh raya persisiran pantai, DSK tidak pernah mengumumkan kepentingan beliau di dalam Zara. Tiada rekod juga yang menunjukkan bahawa Lembaga Pemegang-Pemegang Amanah Yayasan Sabah telah bersetuju untuk membina jalan sedemikian. Oleh sebab pembinaan lebuh raya persisiran pantai memberi faedah kepada projek Zara tanpa sebarang kesan yang menjejaskan, ia memberikan tanda yang paling jelas bahawa DSK berhasrat sedemikian dan oleh itu beliau telah sama ada membuat atau menyebabkan keputusan dibuat agar lebuh raya persisiran pantai itu dibina. Adalah di luar keraguan bahawa beliau telah membuat persetujuan itu jika pengaruh, kuasa, manipulasi beliau dan kepercayaan oleh TM di dalam dirinya telah juga diambil kira (lihat ms 563G–I).

(9) Mahkamah telah menerima keterangan bahawa pembinaan Menara itu dan lebuh raya persisiran pantai itu telah menambahkan nilai tanah Zara (lihat ms 564F–G).

(10) Adalah tidak sukar untuk melihat bahawa DSK adalah di dalam kedudukan di mana kewajipan beliau kepada Yayasan Sabah, Seranum dan Sinsuran bercanggah dengan kepentingan beliau di dalam Zara. Dari satu segi, beliau perlu melindungi dan mempromosikan kepentingan Zara dengan memastikan bahawa apa-apa tindakan-tindakan yang akan diambil bagi pihak Yayasan Sabah dan subsidiarinya mestilah memberi faedah kepada Zara, sementara dari satu segi pula, beliau perlu bertindak untuk melindungi kepentingan Yayasan Sabah atau subsidiarinya untuk memastikan bahawa kepentingan-kepentingan mereka dilindungi dan dipromosikan (lihat ms 572A–B).

(11) Keputusan untuk membina Menara itu sahaja bukan keterangan yang mencukupi tentang apa-apa motif yang tidak betul. Mahkamah telah menerima keterangan bahawa tiada pasaran umum untuk ruang pejabat sedemikian dan oleh itu satu pertimbangan mengenai sewaan mungkin tidak sesuai. Walaupun dua projek sedang dirancang selepas konsepsi projek Zara dan mereka mendapat untung daripada projek Zara mungkin menimbulkan syak wasangka tentang motif sebenar di sebalik projek sedemikian, mahkamah tidak cenderung di dalam memutuskan bahawa wujud keterangan yang tidak jujur pada peringkat ini. Tiada keterangan yang mencukupi untuk mahkamah mencapai keputusan sebegini (lihat ms 572G–I).

(12) Walaupun Menara itu diniatkan untuk menarik sama ada pelanggan atau orang ramai ke tanah Zara, ia juga diniatkan sebagai suatu projek mewah bagi Yayasan Sabah dan juga untuk memperuntukkan ruang untuk subsidiari-subsidiarinya. Memandangkan bahawa ia bukan secara keseluruhannya, walaupun sebahagian besarnya, adalah untuk tujuan Zara, mahkamah tidak akan memutuskan bahawa terdapat

A ketidakjujuran berdasarkan keterangan tersebut. Fakta bahawa DSK adalah seorang barrister, bahawa beliau tidak mendapatkan kebenaran yang dimaklumkan, bahawa beliau tidak mendedahkan kepentingan beliau di dalam Zara dan bahawa beliau mengetahui tentang percanggahan kepentingan adalah tidak lebih daripada elemen-elemen yang menjurus kepada membuktikan suatu perlanggaran kewajipan fidusiari. B Ini bukan keterangan yang tidak jujur. Daripada keterangan ini, tidak boleh dikatakan bahawa DSK telah sama sekali tidak memperdulikan langsung kepentingan Yayasan Sabah dan subsidiari-subsidiarinya sehingga tindakan beliau mungkin boleh dianggap sebagai tidak jujur. Ia adalah hanya lebih C bersesuaian dengan tujuan-tujuan Zara agar Menara dan lebuh raya persisiran pantai itu dibina dan DSK adalah berada di dalam kedudukan yang bercanggah memandangkan beliau telah menyebabkan keputusan-keputusan beliau melanggar kewajipan-kewajipan fidusiari beliau (lihat ms 573G–574B).

(13) Oleh kerana tiada ketidakjujuran dan motif tidak betul yang D dominan yang telah dapat dibuktikan, remedi yang sesuai di dalam kes ini adalah penyeraham kembali keuntungan dan itulah nilai kemajuan kepada tanah Zara (lihat ms 574G).]

Notes

E For cases on fiduciary relationship, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2097–2100.

Cases referred to

A-G for Hong Kong v Charles Warwick Reid & Ors [1994] 1 AC 324 (refd) F

Aberden Railway Co v Baikee Bros (1854) 1 Macq 561 (refd)

Ang Hiok Seng v Yim Yut Kiu [1997] 1 CLJ 497 (refd)

Boardman & Anor v Phipps [1967] 2 AC 46 (refd)

Bristol and West Building Society v Mothew [1998] Ch 1 (refd)

Canadian Aero Service Ltd v O'Malley & Ors (1973) 40 DLR (3d) 371 (refd) G

Canson Enterprises Ltd v Boughton & Co [1991] 2 AC 663 (refd)

Coomber v Coomber [1911] 1 Ch 723 (refd)

Creditcorp Ltd v Russell King & Ors English Court of Appeal, 30 July 1992, 1990 C No 5625, Unreported (refd)

El Ajou v Dollar Holdings Plc [1994] BCC 698 (refd) H

French Protestant Hospital, Re The [1951] 1 Ch 567 (refd)

H (Minors), Re [1996] AC 563 (refd)

Hock Hua Bank (Sabah) Ltd v Lam Tat Ming & Ors [1995] 4 MLJ 328 (refd)

Hornal v Neuberger Products Ltd [1957] 1 QB 247 (refd)

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New Zealand Netherlands Society Orangje Incorporated v Laurentius Cornelius Kuys [1973] 1 WLR 1126 (refd)

Peso Silver Mines Ltd (NPL) v Cropper (1966) 58 DLR (2d) 1 (refd)
Regal (Hastings) Ltd v Gulliver & Ors [1967] 2 AC 134 (refd)
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 (refd)
Saminathan v Pappa [1981] 1 MLJ 121 (refd)
Sargeant v National Westminster Bank Plc (1990) 62 P & CR 518 (refd)
Securities & Exchange Commission v Chenery Corp (1943) 318 US 80 (refd)
Swain v Law Society [1981] 3 All ER 797 (refd)
Swindle v Harrison [1997] 4 All ER 705 (refd)
Target Holdings Ltd v Redferns (a firm) [1995] 3 All ER 785 (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Shah Mohd & Ors [1997] 2 CLJ 607 (refd)
Yamamori (Hong Kong) Ltd v Noel Kenneth Davidson & Ors [1992] 2 MLJ 410 (refd)

Legislation referred to

Sabah Foundation Enactment (No 8) 1966 s 11

Martin Mann QC (*Alex Decna*, *Junior Koh* with him) (*Jayasuriya Kah & Co*) for the plaintiffs.

Cherryman QC (*Douglas Lind, Desmond Liaw* with him) for the defendants.

Mohd Amin Tengereng (State Counsel) for the Government of the State of Sabah.

Cur Adv Vult

Ian Chin J:

Introduction

Both these suits were taken out on 22 February 1979 and were tried together because a lot of the facts are common to both. However, since the narration of the events of Civil Suit No 352 of 1979 (Suit 352) ends earlier I will consider and decide on Suit 352 first but only in relation to the claim of the plaintiffs and not the counterclaim of the defendants against the Government of the State of Sabah.

SUIT 352

The plaintiffs in this suit are the Sabah Foundation ('Sabah Foundation') and Seranum Sdn Bhd ('Seranum') while the defendants are Datuk Syed Kechik bin Syed Mohamed ('DSK') and Banita Sdn Bhd ('Banita'). As against DSK the plaintiffs claim:

(a) a declaration that DSK is accountable to the plaintiffs for all profits made in respect of a special timber licence;

(b) declaration that DSK is accountable to the plaintiffs for the profit which would have accrued to the plaintiffs if the said licence had been issued to them;

(c) an account of profits, loss profits and an order for payment; and

(d) damages

while the claim against Banita is for:

- (a) a declaration that they hold and have at all times held the said licence as constructive trustees for the plaintiffs;
- (b) an account of profits and an order for payment; and
- (c) damages.

Before I turn to the task of setting out the facts of this case that give rise to this action and of deciding on the factual disputes, the claims of the plaintiffs have to be set out in more detail so that the disputes can be identified.

The claim

The allegations against DSK are that he was 'guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty' as director of Sabah Foundation and as managing director of Seranum in that:

1. he deliberately failed and neglected to make the necessary arrangements with which he was expressly entrusted by the State Government for the whole of certain surrendered timber areas to be given to the Sabah Foundation or Seranum;
2. he made use of the opportunity and knowledge acquired by him as fiduciary agent of the plaintiffs to make a profit for himself and Banita or for unknown persons to the detriment of the Sabah Foundation or Seranum;
3. he fraudulently concealed from the trustees of Sabah Foundation and the board of directors of Seranum the fact that Banita had applied for and been granted a special timber licence over the said timber area and he failed to disclose his control and beneficial interest in Banita; and
4. he dishonestly informed the State Government that Sabah Foundation had agreed to the special timber licence being given to Banita and did so without the knowledge or proper authority of the Sabah Foundation or Seranum.

All those allegations are denied by the defendants and their defences will be referred to when the issues are considered. I turn now to the facts.

Facts of case

In 1965 DSK was sent by the Federal Government to Sabah to be the political and legal advisor of Tun Mustapha ('TM') and TM was later, on 11 May 1967, to become the Chief Minister cum Minister of Natural Resources of Sabah. In 1968, DSK opened a law office in Kota Kinabalu. The Sabah Foundation Enactment (No 8) 1966 ('the Enactment'), setting up the Sabah Foundation was passed and came into force on 10 May 1966 with TM as the first Chairman. On 15 June 1967, DSK was appointed its first director, and also a trustee as from 7 September 1975, which two posts he held until 14 June 1976.

The preamble says the Enactment is 'to provide for the establishment of a Sabah Foundation for the purposes of improving, and furthering the progress of, education and educational facilities in Sabah and of encouraging and promoting a Malaysian consciousness therein and to assist and to promote a more equitable distribution of economic wealth amongst the peoples of Sabah and Malaysian citizens residing in Sabah and for giving aid to charitable institutions; for the establishment of a Fund and the appointment of Trustees for the carrying out of the purpose of the Foundation; and for matters connected therewith and incidental thereto'.

The Sabah Foundation is managed by a board of trustees who are empowered to carry on business for the purposes of the Sabah Foundation. The director, appointed under s 11, is to be the executive officer of the Sabah Foundation and he exercises such powers and performs such duties and function as the board of trustees direct from time to time. The Enactment was in 1967 amended to allow the Sabah Foundation to apply for and extract timber. Seranum was incorporated in 1974 and was regarded as a subsidiary of Sabah Foundation and DSK was at all material times variously its director, managing director and secretary. Syed Salam Albukhary ('SSA'), the brother of DSK, assisted DSK in some of the affairs of the Government, the Sabah Foundation and Seranum.

On 4 April 1975, Banita was granted the special timber licence, the details of and circumstances under which it was granted will be stated shortly. DSK was at all material times directly or indirectly in control of Banita and was also its directing mind.

It was in 1969 that a Cabinet Paper No 53/69, dated 18 September 1969, was prepared and it dealt with forest policy on long term timber concessions and it, among other things, proposed the taking back of areas reserved for the concessionaires. One of these concessionaires was Wallace Bay Sdn Bhd ('Wallace Bay') and it is part of this company's timber area that was taken back and given to Banita that is the subject-matter of Suit 352. The Cabinet Paper proposed that the State Government: (1) do not renew the licences given to the 12 concessionaires (each of whom held the concession from the government under a 21-year agreement); (2) appoint three negotiators to negotiate on behalf of the government to take back areas not covered by those agreements but reserved for them; and (3) grant timber concession of not less than 3,000 sq miles with an annual coupe of 30 sq miles to a public company to be formed for the benefit of Malaysian citizens resident in Sabah. These proposals were accepted by the Cabinet.

This led to the appointment, by way of a letter dated 22 September 1969 from the Chief Minister Department, of DSK, James Voon and HS Martyn ('Martyn'), the then Conservator of the Forestry Department, as members of the negotiating team, with DSK as chairman. The team was to negotiate on behalf of the Sabah State Government with the 12 concessionaires the taking back of the balance of the areas reserved for them. The letter went on to state that the government was prepared to grant to the concessionaires an increase of 5% in the annual coupe of the logging areas of these concessionaires. This negotiating team sprang into action immediately and it resulted in 12 agreements between the negotiating team

and the 12 concessionaires. Concerning myself only with Wallace Bay, the A
agreement was dated 7 November 1969 and it resulted in Wallace Bay surrendering its reserved area to the government which area is to be reckoned taking into consideration the 5% increase to its then existing annual coupe of 10 sq miles. But the boundaries of the area to be surrendered were yet to be determined. This agreement was followed by a request by DSK, as chairman of the negotiating team, for maps to be drawn B
by Wallace Bay for the purpose of identifying the various areas.

It was around this time that DSK began acquiring the land (which was subsequently transferred to Zara Sdn Bhd ('Zara') after it was incorporated on 30 January 1970) for a project called Zara Project. The details of the Zara Project are not relevant to this suit and therefore should not detain our C
attention any more save that the conduct of DSK in relation to them would be a relevant consideration for this suit.

On 23 May 1970, TM as Chief Minister, wrote to DSK, as director of Sabah Foundation, to inform the latter of the Cabinet proposal regarding the formation of a company to benefit Malaysian citizens resident in Sabah and DSK was requested to implement it. DSK acting on that instruction D
communicated with Martyn for the selection of 3,000 sq miles of good and speedily loggable timber land from the areas surrendered by the 12 concessionaires and to mark out area sufficient for the first year's coupe of 30 sq miles. The Conservator replied by a letter dated 21 July 1970 and, after naming the forest reserves from which the 3,000 sq miles were to be taken, stated: E

> 3 The selection and delineation of the 3,000 square miles has now been completed and I forward herewith the relevant maps showing the Concession area. In the selection and delineation of the Concession area, an allowance of 20% was provided for and added on to it giving a total acreage of approximately 3,678 square miles; this 20% allowance is F
> necessary for Forest management purposes. The total area of 3,678 square miles has been selected in the following Forest Reserves.

On 27 July 1970, TM wrote to DSK to confirm the corporate mechanisms, that is, the formation of three companies, Syarikat Ra'ayat Berjaya Sdn Bhd (operating company), Syarikat Ra'ayat Bersatu Sdn Bhd (trustee company) G
and Syarikat Sabah Berjaya Sdn Bhd (selling company), and the appointment of officers. TM was to be chairman of all three, DSK managing director (on an honorary basis) and James Voon to be full time general manager for reward. DSK was to continue as director of the Sabah Foundation (on an honorary basis) receiving previous honorarium fees and other remuneration that he was receiving as such director. This was H
followed by the grant on 28 December 1970 by TM to the Sabah Foundation of the timber concession of 3,000 sq miles to fund activities and 300 sq miles as management reserve.

In August 1971 DSK by a letter dated 15 July 1971 reported to the Secretary for Natural Resources the successful completion of negotiations with the 12 concessionaires and the report recommended that the I
concessionaires be allowed to retain 20% of the area as management reserve, which was stated in the report of the negotiating team to be

approximately 200 sq miles, but this recommendation was not accepted. The report of the negotiating team, at p 196, explained the size of various areas in these words:

> The total concession area covered by the 12 concession Licence Agreements before the commencement of negotiations was 7605.8 square miles. The total area required to sustain twenty one year coupes was 145.3 square miles (of which 874.5 square miles remained to be logged as at 31 December 1969) leaving a balance of 6148.5 square miles. From this, there should be deducted an area of approximately 43.8 square miles being the additional allowance of 5% of 874.5 square miles, and a further area of approximately 200 square miles being the 20% management reserve subject to Government's approval. The net area taken back by Government worked out to be approximately 5900 square miles as follow:

Total area covered by 12 timber concession Licence Agreement		7605.8 sq miles
Less: area required to sustain 21 years' coupe for the 12 Concessionaires		1457.2 sq miles
		6148.5 sq miles
Less: area covered by 5% allowance on 874.5 sq miles being area to be worked from 1970 to expiry of Licence	43.8 sq miles	
Less: area reserved for management being 20% of 918.3 sq miles (874.5 + 43.8)	183.7 sq miles	227.5 sq miles
		5921.0 sq miles

The report was prepared with the help of Inocencio Sario, an officer of the Forestry Department, but who was at that time seconded for three years to the Sabah Foundation. This officer remained on the payroll of the Forestry Department. This officer had also made various other reports to DSK as the chairman of the negotiating team. SSA also had a hand in the report and he said that he had discovered that the management reserve, based on figures obtained from new maps supplied to him by Martyn, was greater than as mentioned in the report. According to him it should be 294.7 sq miles instead of 183.7 sq miles. SSA said this discovery was told to DSK and Kassim at around the time he handed the letter dated 7 August 1971 (including maps and agreements) to Kassim. There was, according to SSA, an excess of 110 sq miles.

It was contended by Mr Cherryman QC that it was TM who suggested the application of a timber licence that was made by Banita on 29 July 1974. The evidence that learned counsel relied on is the following statements that were elicited in the examination of SSA, viz:

Q B2, 505 [Application for licence by Banita dated 29 July 1974] — whether you know in what circumstances and why an application for timber licence was made?

A Made at the suggestion of TM.

Q How did you know that?

A DSK told me in December 1973. We had meeting with TM at his office at the secretariat, had discussed several matters at meeting. I left earlier after this matter was just about to be discussed regarding the 20% reserve area. When DSK started mentioning sports complex and I left at beginning of this discussion and I waited at TM's secretary office.

Q The[n] what happened?

A Later on when we got back, DSK told me TM had decided that the government resumed the 20% management reserve and that the area would be returned to government for purposes of funding the sports complex development. He suggested DSK applied for an area of 40 square miles out [of] this management reserve area.

Q You still insist there was meeting in December 1973 during the course of which according to your brother TM promised your brother he would have timber licence for 40 square miles?

A Yes.

That evidence of SSA surely cannot be evidence that TM had suggested the application of the licence. He was not present when TM had allegedly said to DSK that the area was to be 'gifted' to DSK or his nominee. SSA was told so by DSK. It was hearsay if that evidence is sought to establish the fact of TM having made the gift. In so far as reliance is placed on this hearsay as supporting the defence that TM had 'gifted' the area to Banita which it had applied for, it must necessarily fail. DSK and TM did not testify and both could not do so, the former on account of infirmity and the latter had since demised. In any event, I do not find SSA a credible witness for the same reasons that I will be giving when disclaiming him in Suit 351.

Returning now to the report, the recommendation concerning the 20% management reserve was rejected when on 5 January 1974 TM wrote informing the Secretary of Natural Resources of the Government's rejection. The Government, as said in the letter, intended, instead, to give it to Sabah Foundation to use the profits to build stadium and sports complexes in every major town in the State. This letter is in these terms:

> According to the report of the Negotiating Team which was appointed by the Government on 22 September 1969 to negotiate back forest areas held by the 12 Timber Concessionaires by separate concessions in this state, the Negotiating Team has recommended that the Government approve 20% of the area comprising approximately 200 sq miles be reserved as timber management areas. However, the recommendation was rejected by the State Government.
>
> Accordingly, I hope that the Dept of Natural Resources will submit to the 12 Concessionaires that the Government will take back the reserved area so that it can be given to the Sabah Foundation, who will work the area and use the profits to build stadium and sports complexes in every major major town in the State.

> The same Negotiating Team will be appointed to negotiate the surrender of the areas from the 12 Concessionaires.

On 18 March 1974, the Secretary of Natural Resources wrote to DSK concerning the 20% management reserve (subsequently negotiated down to 15%) in these terms:

> Earlier I have been directed by the Government to inform you that the State Government has decided to take back the forest reserve of 20% which was reserved as management areas for the 12 Timber Concessionaires who are the only concession holders in the State.
>
> 2 The area which will be taken back will comprise approximately 200 sq miles and is to be given by the Government to the Sabah Foundation Group for the Group to work the area and utilise the profits so generated to build stadium and sports complexes in every major town in the State.
>
> 3 You are requested to make the necessary arrangements to enable the Sabah Foundation to fulfil these objectives.

By an agreement made on 17 April 1974, Wallace Bay surrendered 15 per cent of its concession to the Government and provision was made for the boundaries and area to be determined and agreed. The area came out to be 39.625 sq miles, that is, approximately 40 sq miles. On 29 July 1974 Banita applied to the acting Chief Minister for the special timber licence to work an area of approximately 39.625 sq miles of the Wallace Bay concession area and constituting the management area to be returned to the government. DSK reported to the Secretary of Natural Resources that the total area constituting the 15% of the areas to be taken back from the 12 concessionaires amounted to 241.562 sq miles of which Wallace Bay area accounted for the said 39.625 sq miles. A report on the timber stand of these 39.625 sq miles was made on 19 September 1974 by the Sabah Foundation's group forest manager to DSK as the chairman of the negotiating team. This was followed by a letter from the Secretary of Natural Resources to TM dated 26 September 1974 recommending the approval of 201.937 sq miles of the 241.562 sq miles, that is 39.625 sq miles less, to Sabah Foundation for the purpose of generating fund towards the erection of sports complexes and stadium in major towns in the State. Sabah Foundation then on 29 September 1974 applied for a licence for the 201.937 sq miles to be issued to Seranum. A dispute arose during the trial as to the admissibility of an alleged copy of a Cabinet minute paper and which I ruled to be admissible. This document is in these terms:

> Minute Paper No MNR 414/15/S1
>
> 2–1A Letter dd 29 July 1974 from Banita Sdn Bhd

3/10

> YAB KM
>
> 1 Please refer to R.2 and footnote. Syarikt Banita Sdn Bhd applied for an area of 39.625 square miles in Kalabakan to be worked in one go (i.e. without any restriction).
>
> 2 This area is an area which was surrendered by Wallace Bay based on discussions with the 'Negotiating Team' in which a remainder of 15% from their area had to be surrendered. As such, this area is available, and the Sabah Foundation has agreed to give it to the applicant.

> 3 I submit this application for Your Honour's consideration. As the area is available, accordingly, I have no objections.
>
> Approved.
> Mohd Said
> Pem km 8/10/74

In so far as the statement therein contained that Sabah Foundation had agreed to give 39.625 sq miles to Banita, no reliance can be placed on it as establishing the fact that Sabah Foundation had in fact agreed to give the area to Banita nor can any inference be drawn that DSK had anything to do with the alleged consent of Sabah Foundation. The truth of that statement was not proven though the document was proven to exist.

On 1 April 1975, licences were issued respectively to Banita for 39.625 sq miles and to Seranum for 142.362 sq miles instead of 201.937 sq miles. It is a fact, and in any event it is not in dispute, that DSK did not offer the opportunity of applying for the licence he eventually secured in Banita's name to Seranum nor did he draw such opportunity to the attention of the Board of Trustees of the Sabah Foundation.

The reduced area was, it can be concluded, the result of a letter written by DSK, as director of Sabah Foundation and as its group managing director, to the Secretary of Natural Resources dated 3 March 1975 which relevant part is in the following terms:

> According to the final report of the Sabah State Government Negotiating Team dated 1 March 1975 addressed to you the actual total area to be surrendered to the Government by the 12 (12) Timber Concessionaires is only 181.987 square miles worked out as follows:
>
> As a result of the above decrease in areas, the actual area to be granted to SERANUM Sdn Bhd under the Special Timber Licence will be 142.362 square miles as follows:

1	Actual total available area	=	181.987 sq miles
2	Less: Wallace Bay Sdn Bhd's area which has been approved to a third party vide MNRC 414/15/51/4 dated 9 October 1974	=	39.625 sq miles
			142.362 sq miles

> In view of the above, the Sabah Foundation will be most grateful if you could kindly instruct the Forest Department to immediately issue a Special Timber Licence covering an area of 142.362 square miles (the maps of the areas comprising the said 142.362 square miles are attached hereto to SERANUM Sdn Bhd to be worked (logged) under a blanket authority so that the Sabah Foundation Group could generate the necessary funds to meet its immediate commitments on the construction of the various sports complexes in the State of Sabah. As it is the Government's intention that the proceeds of sale of the timber from the Special Timber Licence are granted to SERANUM Sdn Bhd less all extraction costs and other necessary incidents are to be utilised solely for the construction and erection of the various sports complexes in the State of Sabah and as SERANUM Sdn Bhd shall be charged with the responsibility

> A of the extraction of the timber as well as the construction and erection of the said sports complexes it is necessary that an agreement be entered into between the Government of the State of Sabah and SERANUM Sdn Bhd. This Agreement referred to herein will be submitted to you in due course.

B The agreement that was proposed in that letter was executed on 12 June 1975 between the government and Seranum and since a lot of the terms of this agreement are relied on extensively in support of the argument for the case for the defendants, it is necessary to reproduce the relevant terms, viz:

> WHEREAS the Government is desirous that certain works beneficial to the community of the State of Sabah should be constructed, viz Sports complexes and stadiums in various towns in the State of Sabah particulars of which are C contained in the First Schedule attached hereto (the sports complexes and stadiums being hereafter referred to as 'the said complexes').
>
> AND WHEREAS the Government, to achieve this objective, has entered into agreements with a number of persons (hereinafter collectively referred to as 'Timber Concessionaires') for the surrender to the Government of the areas held by the said Timber Concessionaires as Forest Management Reserve D Areas.
>
> AND WHEREAS the said Timber Concessionaires have in compliance with their agreements entered into with the Government surrendered their Forest Management Reserve Areas to the Government.
>
> AND WHEREAS the area so surrendered by the said Timber Concessionaires is approximately 181.987 square miles.
>
> E AND WHEREAS the Government has agreed to hand over to the Contractor an area of approximately 142.362 square miles (hereinafter referred to as 'the Said Area') out of the area of approximately 181.987 square miles under a Special Timber Licence.
>
> AND WHEREAS the Government has agreed to appoint the Contractor F to construct, complete and hand over to the Government the said complexes.
>
> AND WHEREAS in furtherance of its objective the Government has granted a Special Timber Licence No SK 1/75 to the Contractor dated 1st day of April, 1975 covering the Said Area.
>
> AND WHEREAS under the terms of the said Special Timber Licence SK 1/75 issued on the 1st day of April, 1975 under the Forest Enactment, G 1968 and the Forest Rules, 1969 (hereinafter referred to as the 'Concession Area') the Contractor is authorised to extract all commercial and merchantable timber from the said Concession Area for sale and to sell them and thereby to generate necessary funds for the construction and completion of the said complexes.
>
> AND WHEREAS the Contractor has accepted the appointment for such H consideration and upon such terms and conditions as hereinafter contained.
>
> NOW IT IS HEREBY AGREED as follows:
>
> 1 *Acceptance*:
>
> In consideration of the Government granting to the Contractor a Special Timber Licence No SK 1/75 dated 1 April 1975 to extract from the Said I Concession Area all commercial and merchantable timber and to sell them, and for such other consideration as is provided herein. Provided, the contractor agrees, to construct complete and hand over to the Government the said complexes.

2 *Contractor's Responsibilities in Connection with Extraction and Sale of Timber*: A

It shall be the responsibility of the contractor:

(a) To extract all commercial and merchantable timber from the Said Concession Area until the date of expiry of the Said Special Timber Licences, subject to conditions therein contained and to the provisions of the Forest Enactment, 1968 and the Forest Rules, 1969; B

(b) To extract timber in accordance with the directions of the Conservator of Forests, Sabah;

(c) To provide, establish and maintain requisite log ponds;

(d) To comply with the requisite provisions of the Labour Ordinance, Sabah, Workmen's Compensation Ordinance, Sabah and Employees Provident Fund Ordinance No 21/51 as extended to Sabah; C

(e) To pay all taxes, rates and other charges in respect of all workmen and others under this Agreement;

(f) To observe and comply with all Forest Department Rules and Regulations which are now in force or may hereinafter be brought into force during the currency of this Agreement; D

(g) To provide and maintain, sufficient and adequate machineries and equipments, inclusive of spare parts, for the extraction of the timber;

(h) To provide sufficient workshop facilities to carry out running repairs;

(i) To maintain sufficient and requisite skilled personnel; E

(j) To maintain all proper books and records and make them accessible for inspection by Government Officers, on demand;

(k) To pay the wages of the workmen employed in the extraction of the timber from the Concession Area and other related employees;

(l) To construct roads and access roads within the Concession Area to facilitate Contractor's operation; F

(m) To employ all requisite personnel for its operation;

(n) To enter into agreements with the Buyers for the sale of the timber extracted;

(o) To negotiate the sale price periodically and to make adequate arrangements for payment thereof; G

(p) To make arrangements with the shipping companies for the transportation of the logs purchased; and

(q) To execute all necessary documents in connection with the extraction and sale of timbers covering various aspects of the transaction. H

(2) *Contractor's Responsibilities in Connection with Construction and Establishment of the Said Complexes:*

(a) To pay out of the gross funds, the amount of award awarded in respect of each parcel of land acquired under the process of law for the said complexes;

(b) To pay the consideration for the parcel/s of land if acquired by negotiation, out of the gross funds, for the said complexes; I

(c) To make possession of the parcels of land that have been either acquired by way of compulsory acquisition or obtained by

A negotiations by the Government and to be in charge of them till they are handed over with the various complexes constructed thereon to the Government;

(d) In consultation with the Government, to draw up or cause to draw up plans and specifications for various complexes and to submit the same to the relevant approving authorities and to obtain the approval of such authorities; B

(e) To engage sub-contractors to carry out the construction of the complexes and to pay progressive payment periodically on the certificate issued by Architects or Engineers or Consultants;

(f) To engage Architects, Engineers, Surveyors, Consultants, for the purposes of preparing drawings, plans and specifications for the said C complexes and supervising the progress of the construction of the said complexes;

(g) To pay for the supplies of materials required in connection with the construction of the said complexes;

(h) To finance completely the construction and establishment of the said complexes out of the Gross Fund derived from the sale of the D timber out of the Concession Area;

(i) To keep true and proper accounts of all receipts and payments relating to the operation of the Bank Account in respect of the gross fund and to submit, within seven (7) days after the and of each calendar month to the Government a certified statement of the sum received from the sales of timber extracted form the said Concession E Area together with the disbursement from the said gross fund, for the relevant period together with such other information as the Contractor shall deem fit;

(j) As soon as may be, after the receipt of the approved plans, drawings and specifications in respect of each item under the said complexes, the Contractor shall proceed forthwith to prepare a detailed time F schedule with regard to the progress of construction of that particular item and submit it to the Government for its approval. The Contractor shall conform to such time schedule when approved or to be modified by mutual consent (if needed) between the Government and the Contractor;

3 *Sub-contractors*:

G The Contractor shall be at liberty to employ sub-contractors, at its discretion, for the extraction of the timber from the said Concession Area and shall be at liberty to appoint agent/s as it deems fit in the discharge of its responsibilities.

4 *Funds Realized from the Sale of Timber*:

H The Contractor shall deposit the periodical gross proceeds of the sale of timber into a Special Account with a Bank in Kota Kinabalu and out of this account, the disbursements shall cover,

(a) The agreed fees payable to the Contractor by way of consideration for his services;

(b) All expenses in connection with timber operation;

I (c) All expenses in connection with the construction and completion of the said complexes;

(d) All awards payable in connection with the acquisition of parcels of land for construction and establishment of the said complexes;

(e) All agreed fees for consultants, engineers, architects, etc.;

(f) Payments for drawings, plans, specifications in connection with the construction of the said complexes;

(g) To pay for the materials for the building and for equipments for the complexes;

(h) To pay the Contractors engaged to carry out the construction of the said complexes;

(i) Other relevant disbursements in connection with the establishments of various complexes.

5 *Acquisition of Parcels of Land*:

The Government shall acquire the necessary parcels of land for the construction and establishment of the said complexes in various districts within Sabah and as soon as each acquisition is completed, it shall inform the Contractor, giving the particulars of the acquisition to enable the Contractor to take possession of the same and to commence its construction of the specified complex in that area.

6 *Awards*:

All awards for the acquisition of parcels of land at the instance of the Government for the construction of the said complexes shall be paid by the Contractor out of the gross funds realised from the sale of timber extracted out of the said Concession Area.

7 *Consideration for Contractor's Services*:

The agreed consideration for the services of the Contractor shall be at the rate of 10% (ten per centum) of the completed cost of each and every item of the said complexes.

8 *Assignment*:

9 *Surplus out of Gross Fund*:

In the event, at the end of the completion after the construction of the said complexes, and after all disbursements out of the gross fund, should there remain a surplus to the credit gross fund, such credit surplus shall be handed over to the Government for the maintenance of the said complexes.

10 *When the Gross Fund is Found Insufficient*:

In the event, the gross fund generated out of the sale of the timber extracted from the said Concession Area, is or found insufficient based upon the overall estimated costs of construction of the said complexes, to complete the construction of each and every item of the said complexes, as shown in the First Schedule hereto, then the Contractor shall exercise his discretion and with the advice of the Government shall complete those projects that could be completed well within the available gross funds.

[Etc ....]

FIRST SCHEDULE

[Etc ....]

Grand Total: 112,684,200

(Malaysian Dollars One hundred 12 six
hundred eighty four thousand and two hundred only)

On 15 April 1976, the government headed by TM was voted out of office and replaced by a government formed by the Berjaya Party. DSK resigned as director of Sabah Foundation and as managing director of all its subsidiaries. The timber licence of Banita was cancelled by the government on 6 August 1976 and this was challenged in court and followed with amendment to the law to allow cancellation in the public interest. A notice of cancellation was thereafter issued on 15 January 1977 under the new provision.

This is the convenient place to pause the narrative to consider the disputes surrounding this timber area that was granted to Banita.

I am not unaware of the submission of Mr Cherryman QC that these suits were politically motivated after Berjaya took over the reign from USNO in 1976 when Berjaya vowed to expel DSK. Be that as it may, if the plaintiffs have a legal right to pursue the actions, their motives are irrelevant and cannot be set up as a defence to what otherwise is a legal right of the plaintiffs. In any event, it was not urged that the actions ought to be dismissed on account of the motive. In fact, the investigation and prosecution of these actions was left, not to political whims, but to the professionals. In the end it is the evidence of members of the public service, employees of the Sabah Foundation and its subsidiaries, accountants and valuers that matters and not any political motive. There is no suggestion that any of the evidence of the witnesses, save for Datuk Harris Salleh, was afflicted with their political bias. As for the evidence of Datuk Harris Salleh, in so far as it relates to what had happened before he assumed office as Chief Minister of Sabah, it is of no help in resolving the issues. His other evidence concerns the character or person of TM of which there is no serious dispute. Criticisms were also directed at the way the plaintiffs had, or rather had not, prepared their case and at the manner in which allegations were hurled at the defendants when SSA was cross-examined. Here again, those comments are not relevant because whatever it is, the task of finding the truth has to be done irrespective of those alleged actions or inactions which Mr Cherryman QC complained of save that the failure of the plaintiffs to secure the document concerned which was with the government and the failure on the part of the defendants to disclose fully or to make timely disclosure of documents in their possession make the task a little bit more difficult. I turn now to the real issues concerning Suit 352.

Standard of proof

The plaintiffs alleged that DSK was 'guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty as director and subsequently as trustee' of Sabah Foundation and as managing director of Seranum in that: (1) he failed in his entrusted duty to cause the whole of the surrendered area to be given to Sabah Foundation or Seranum; (2) he made use of the opportunity and knowledge acquired by him as fiduciary agent of the plaintiffs to make a profit for himself, for Banita or for unknown persons to the detriment of Sabah Foundation; and (3) he fraudulently concealed from the trustees of Sabah Foundation and board of directors of Seranum the fact Banita had applied for and been granted a licence over the Wallace Bay area and he failed to disclose his control and financial interest in Banita. There was a fourth allegation which I have already found as not supported by evidence and that is that he dishonestly informed the government that Sabah Foundation had agreed to the licence to be given to Banita. But it must be said that not all those claims are framed exclusively in fraud. Claims (1) and (2) are also based on breach of fiduciary duty. This is important to bear in mind because for a claim based on a breach of fiduciary duty, it is not necessary to prove dishonesty or fraud as was said in *Boardman & Anor v Phipps* [1967] 2 AC 46 at p 134, per Lord Russell of Killowen, viz:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by this action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

In fact, in *Swain v Law Society* [1981] 3 All ER 797 at p 814, Oliver LJ was of the view that the rule operated even where a trustee has acted in good faith and made full and frank disclosure. In that case the court held:

> (3) It was a strict rule of equity that a person who owed a fiduciary relationship to another was accountable to that person for any profit or advantage derived from the relationship The Law Society, by entering into the master policy arrangement with the insurers on behalf of all solicitors and with the object of holding the benefit of the insurers' obligations as trustee for individual solicitors, thereby established a fiduciary relationship between itself and individual solicitors, and since the opportunity to obtain commission was derived from the master policy arrangement the society had therefore obtained the commission by reason of its fiduciary position, notwithstanding that the contract between the society and insurers was concluded before the fiduciary relationship arose or that the society had placed itself in a position where its duty as trustee arising out of the fiduciary relationship and its own interest in receiving commission might conflict. It followed that in principle the society was accountable to individual solicitors who paid premiums under the scheme for the commission received by it.

Oliver LJ at p 814 said this:

> It seems to me therefore, as it seemed to the judge, that what one has to do is to ascertain first of all whether there was a fiduciary relationship and, if there was, from what it arose and what, if there was any, was the trust property; and then to inquire whether that of which an account is claimed either arose, directly or indirectly, from the trust property itself or was acquired not only in the course of, but by reason of, the fiduciary relationship.
>
> If it is found as a result of that inquiry both that there is a fiduciary relationship and that the fiduciary has derived from it a profit which has not been made available to his beneficiary, then it matters not that profit is one achieved openly and in the utmost good faith nor, in the absence of consent,

> A that it has been fully and frankly disclosed; the principle of equity is inflexible and the fiduciary must hold it for the benefit of the person for whom his fiduciary must hold it for the benefit of the person for whom his fiduciary duty was undertaken or assumed.

In my view last mentioned principle of *Swain v Law Society* should also B reflect the legal position in Malaysia. A fiduciary in Malaysia who is similarly circumstanced would be required to disgorge his profit. In so far as it is necessary to prove fraud and dishonest design, there is no dispute that there must be cogent and credible evidence before a case can be said to have been made out. The standard of proof is proof on a balance of probabilities (*Ang Hiok Seng v Yim Yut Kiu* [1997] 1 CLJ 497) but because C of the seriousness of the allegation it must attend a higher degree of probability (*Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at p 258). That does not mean that it is a new degree of proof between that of proof beyond reasonable doubt and proof on a balance of probability. As for what that means, *Re H (Minors)* [1996] AC 563 at p 586, provided the explanation in these terms:

> D … Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury …
>
> … this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when E weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451 at p 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'

F There is no dispute those are the legal principles that pertain to proof in these two cases. As for this suit, it seems to me that the pleading asserts the very acts, enumerated in (1), (2) and (3) when viewed in the circumstances (which are set out in the statement of claim) constitute fraud and dishonesty. In this regard I agree with Mr Mann QC that a fraud case can G be and had been pleaded on inferences and that: (1) it is by the drawing of legitimate inferences from circumstantial evidence that most fraud cases are pleaded; and (2) that is also the way in which most fraud cases are proved at trial (*Creditcorp Ltd v Russell King & Ors*, English Court of Appeal, 30 July 1992, 1990 C No 5625, Unreported). Another pleading point to bear in mind is that where fraud is alleged, the court should ensure that the H plaintiffs do not depart from their pleaded case (*Saminathan v Pappa* [1981] 1 MLJ 121 at p 125).

Since fraud and dishonesty are alleged against DSK this will be the opportune moment to discuss what they legally mean. The term 'dishonesty' was discussed in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] I 2 AC 378, where Lord Nicholls at p 389, said this:

> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their

> detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately shut his eyes and ears, or deliberately not ask questions, lest he learn something which he would rather not know, and then proceed regardless.

In regard to the question of honesty, I am in agreement with Mr Mann QC, when he (in response to a proposition of Mr Cherryman QC) said that there is no relevant optional scale according to the moral standards of politicians or times during which the events took place because, as was said by Lord Nicholls at p 389, in the just mentioned case:

> The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.

As for fraud, I had the occasion to deal with the meaning of that term in *Hock Hua Bank (Sabah) Ltd v Lam Tat Ming & Ors* [1995] 4 MLJ 328 and where what I said, at p 352, is applicable to this case, viz: 'fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person'. I turn now to deal with the issues.

Whether DSK failed to cause the whole surrendered area to be given to Sabah Foundation

The plaintiffs' case is dependent on establishing that the Wallace Bay area was earmarked for Sabah Foundation. I have earlier stated that the Sabah State Government had intended that the areas to be taken back from the 12 concessionaires, including the Wallace Bay area, be given to the Sabah Foundation and I had also adverted to two letters dated respectively, January 5 and March 18 of 1974 as expressing that intention. Both letters talked of the area taken back to 'be given' to the Sabah Foundation or the Sabah Foundation group for them 'to work the area and utilize the profits so generated to build stadium and sports complexes in every major town in the State'. Going by those terms of the letters, I would have thought there can be no clearer indication than that as regards the intention of the Sabah State Government to give the Wallace Bay area to the Sabah Foundation or its group. This was made even clearer by the secondment of an officer of the Forestry Department, Inocencio Sario, to work in the Sabah Foundation to help in, among other things, identifying the areas. Though it was argued that Inocencio Sario was reporting to DSK as chairman of the negotiating team it does not alter the fact that he was seconded to the Sabah Foundation to serve the interest of the Sabah Foundation though he was assisting the negotiation team.

However, Mr Cherryman QC contended that those letters were in such general inchoate terms that no legitimate expectation could be derived by

A Sabah Foundation that any timber licences would be coming and that TM was free to give the area to anyone before the licence was approved by TM. It was before any licence was granted to Sabah Foundation for the Wallace Bay area that TM made a gift of the area to Banita following a conversation in December 1973, learned counsel continued. In so far as the assertion that TM had made a gift is concerned I have earlier dismissed it as being B unsupported by any evidence.

In coming to the decision that those evidence is not proof that TM had in December 1973 gifted the area in a meeting between TM and DSK I had also taken into account the allegation of SSA (that at least is the impression I got by the manner in which the relevant evidence had been advanced and C relied upon) that this so-called gift came about as a result of the discovery of a larger management reserve area than realised was taken back from the 12 concessionaires which evidence I reject as not capable of being the truth of the matter. It will be recalled that the taking back of the reserved areas of the 12 concessionaires started with the Cabinet Paper and which led to the appointment of the negotiating team headed by DSK. In that letter the D government informed DSK that the government was prepared to increase the annual coupe by 5% from 1970 until the expiry of the licence.

In a schedule annexed to the letter appointing DSK, it was pointed out that the total area under the 12 concessionaire agreements was 7,605.8 sq miles of which they were allowed to log annually an area of 71.3 sq miles E and the total areas required to sustain the annual coupe for 21 years would be 1,457.3 sq miles. This would free 6,148.5 sq miles from the reserved areas since the licences upon their expiry would not be renewed. As at 1 January 1969, the total coupe area required till the expiry of the licences was 945.8 sq miles. For Wallace Bay, the coupe area required was stated to be 160 sq miles. Wallace Bay on 18 October 1969 responded to the F negotiating team to state that the coupe area required from 1 January 1970 would be 150 sq miles and that when the 5% increase was added this figure would come up to 157.5 sq miles. The letter then requested an additional 20% of that figure to replace unworkable area, called management reserve area, and this 20% worked out to be 31.5 sq miles. Thus, Wallace Bay requested an area of 189.0 sq miles. If that area was supposed to be any G larger, as urged by SSA, then one would expect Wallace Bay to assert since it was in their interest to do so. That they had never asserted means that figure was all the time correct.

An agreement was then signed on 7 November 1969 between Wallace Bay and the negotiating team relating to the 10 sq mile annual coupe and H to the increase of 5%. The 20% management reserve was not provided for. The exact area to be surrendered was still to be demarcated. Wallace Bay was to supply the maps to delineate the area to be surrendered. The negotiating team forwarded its report to the government by a letter dated 15 July 1971 and had annexed to it various maps. For ease of reference, I will again reproduce what this report stated, viz:

I

> The total concession area covered by the 12 concession Licence Agreements before the commencement of negotiations was 7605.8 square miles. The total area required to sustain twenty one year coupes was 1457.3 square miles (of

which 874.5 square miles remained to be logged as at 31 December 1969) leaving a balance of 6148.5 square miles. From this, there should be deducted an area of approximately 43.8 square miles being the additional allowance of 5% of 874.5 square miles, and a further area of approximately 200 square miles being the 20% management reserve subject to Government's approval. The net area taken back by Government worked out to be approximately 5900 square miles as follow:

Total area 12 timber concession Licence Agreement		7605.8 sq miles
Less: area required to sustain 21 years' coupe for the 12 Concessionaires		1457.2 sq miles
		6148.5 sq miles
Less: area covered by 5% allowance on 874.5 sq miles being area to be worked from 1970 to expiry of Licence	43.8 sq miles	
Less: area reserved for management being 20% of 918.3 sq miles (874.5 + 43.8)	183.7 sq miles	227.5 sq miles
		5921.0 sq miles

Again, there was reaffirmation of the correctness of the area of the management reserve being 183.7 sq miles.

In support of his allegation of the existence of a larger area than realised, SSA had testified in the following manner:

Q B1, 196 – calculations show 20% = 183.7 square miles, p 200 – 294.7 management reserve – what was the significance of this difference.

A I believe on p196 the calculation shows the area of 874.5 square miles was the balance of the area of the timber concessionaires left in their various lives of licence and the figure of 43.8 square miles made up of 5% ex gratia reward that the government had made to the timber concessionaires. These two figures added together give you 918.3 square miles and 20% of 918.3 is 183.7 square miles.

Q B1, p 200 – column A 1213 deduct 918.3 – where did 1213 come from?

A I have counterchecked when Martyn gave the map, it was the area shown on the map and less 918.3, balance is as shown in Martyn's calculation here.

Q It gives a larger management reserve than calculated in 196.

A Yes.

Q Did you point this out to anyone at that time after you discovered it?

A Yes.

Q To whom?

A I had pointed out to DSK at our office when I was asked to hand carry maps to Kassim, I pointed out to him also.

Q When that was?

A On the same day the letter was written 7/8/1971 (p201). I took letter and attachments mentioned in that letter. Kassim office was a CM department.

Q What did you say to him?

A I showed him 7/8/ letter and attachments. I said to him that we were delayed in this submission because we were waiting for maps from conservator and that the maps had come with schedules and show approx. 300 square miles.

Q How do you find out by looking at maps Martyn provided that the total concessionaires area is 1213 square miles?

A Each map has got a label that shows the area printed on this label. In case of Kennedy Bay, two maps.

Q Did DSK retain duplicate copies of the maps?

A Yes, a set.

Q Labels and other marks that come to 1213?

A Yes.

Q So far as government to make grant of licence is concerned what is the effect of the area of the management reserve being 110 square miles greater than the report stated?

A What it meant is that the government has an excess area of 110 or thereabout that is available other than 183.7 square miles … .

SSA also testified that he made known to DSK this fact and also to the secretary of natural resources when he handed over the report to him. The document referred to as B1, 200 in the evidence is this, omitting the first column which sets out the names of the 12 concessionaires:

Schedule Showing Management Reserve Areas of 294.7 Square Miles
Based on Forest Department's April 1970 Maps
Submitted to Government
7 August 1971

Amended Area As Shown In April 1970 Maps (A)	Balance of Area To Be Worked As At 31.12.69 (B)	5% Increase As Ex-gratia (C) = 5% of (B)	Total Area To Be Worked (D) = (B) + (C)	Management Reserve Area (E) = (A) – (D)
158.0	90.2	4.5	94.7	63.3
49.0	38.7	1.9	40.6	8.4
55.5	45.0	2.3	47.3	8.2
205.0	150.0	7.5	157.5	47.5
180.0	130.0	6.5	136.5	43.5
190.0	144.0	7.2	151.2	38.8

35.0	27.0	1.4	28.4	6.6
162.0	110.0	5.5	115.5	46.5
37.0	32.4	1.6	34.0	3.0
69.5	49.2	2.5	51.7	17.8
47.0	36.0	1.8	37.8	9.2
25.0	22.0	1.1	23.1	1.9
1,213.0	874.5	43.8	918.3	294.7
======	=====	=====	=====	=====

He said the document was submitted at the same time as the report and was attached to the maps. SSA said the map showed the calculation and size. He said it was prepared by him based on the 'conservator's schedule' and that he merely put on the heading. He later said the figures were based on the maps. With regard to this document, it was admitted by Martyn that he had a hand in its preparation together with the mapping section. Martyn explained that the difference from area stated in the report may be due to compilation of new area, new map and old map and he said DSK knew about it. Certain evidence elicited in cross-examination is relied on by the defendants as supporting the fact that there was an excess in the area, viz:

> Q: B1, p 200 – 1213 – 918.3 area is exactly the same as at 196 and deduct 918.3 from 1213 that leaves management reserve area of 294.7 instead of 183.7
>
> A Yes.

That evidence of Martyn is merely a confirmation of the figure derived from a deduction that was put to him which, given the manner in which the question was put, is the only answer that can be given. Answers were similarly extracted from SSA which point to the figure of 183.7 sq miles after applying a certain formula for deductions. Therefore, that evidence of Martyn cannot be relied on as establishing that the management reserve was really 294.7 sq miles nor that SSA had informed the secretary or DSK about it. The basis for inflating the management reserve to 294.7 acres was that the areas of the concessionaires as shown in the map were 1,213 sq miles, which after deducting the coupe area of 918.3 sq miles that the concessionaires were entitled to, would give the area of 294.7 acres. But the figure of 183.7 sq miles was arrived at after taking into account the concessionaire areas of 1,457.3 sq miles. This means there was actually a reduction in the concessionaires area when the figure of 1,213 is compared to 1,457.3 sq miles. That being the case, how can a reduction give rise to an increase when it should result in a corresponding reduction in the management reserve area. This also means when the figure of 1,213 was reckoned, it had already taken into account and included the management reserve area.

If really the management reserve area was 294.7 acres as discovered in 1971 and made known in that year to the secretary and DSK, one would expect the report to be corrected if not on the day the report was handed in then at least days afterwards. Not only was that not done, all subsequent

A letters still referred to the approximate figure of 200 sq miles (based on the calculation of 183.7 sq miles), like the letter of TM dated 5 January 1974 which referred to the report and the letter dated 18 March 1974 from the Secretary of Natural Resources to DSK which still referred to approximately 200 sq miles. If, as alleged by SSA, it is really true that the table (B1, 200) was attached to the maps of the report, it could not have B escaped the attention of the CM or the secretary and he would instead of that figure have stated the figure of 294.7 sq miles. In any event, the report (which SSA had a hand in its preparation) had referred specifically to the maps (which SSA relied on for his figure of 294.7 sq miles) and concluded that the management reserve area was 183.7 sq miles. Considering the fact C that SSA had a hand in almost everything that had to do with the taking back of the area, it is to be expected that he would immediately point out the error, if it was one. Again and again statements were issued pointing to the figure of 183.7 and not 294.7 sq miles and yet there was not even a whisper as to the alleged inaccuracy from SSA or DSK. A constituent part of the 183.7 figure is the Wallace Bay area of 31.5 sq miles as worked out D in the report but this latter figure when it was repeated by Sario in documents (B2, 515, 523) produced by him in 1974 and shown to SSA, also did not evoke any protestation from SSA though SSA had asserted that it should be 47.5 sq miles. The silence speaks loudly of the untruthfulness of the testimony of SSA that the management area was 294.7 sq miles. What I have said thus far is, in my view, sufficient for me to reject SSA's E evidence on this point and I do not propose to go through the many other documents, which Mr Mann QC went through with SSA, and which point to the fact that it was unlikely for SSA's assertion to be true since all those documents do not support SSA's assertion when one would expect them to; even more so since SSA had a hand in them. If really it was true that there were 294.7 sq miles available, DSK would not have reported an area of F 241.562 sq miles and this was also found to be incorrect. It will be recalled that it was on the basis that 241.562 sq miles were available that 201.937 sq miles were to go to Sabah Foundation or Seranum while Banita would get 39.625 sq miles, with Sabah Foundation or Seranum losing nothing since it was still more than 181.987 sq miles. However, as events turned out and not unexpectedly, that figure of 201.937 sq miles was not correct and DSK G in his letter of 3 March 1975 to the secretary explained that only 181.987 sq miles were actually available and this resulted in Sabah Foundation or Seranum getting the cut, that is instead of 201.937 sq miles, it got only 142.362 sq miles while Banita still got the 39.625 sq miles. In my view, the figure of 294.7 sq miles was a creation of SSA in an attempt to substantiate H the allegation of a gift and to justify the allocation of the Wallace Bay area to Banita. This, in my view, belies the alleged 'gifting' by TM in December 1973.

I am of the view that the Wallace Bay area was given to Banita as a result of the application of Banita which I have already referred to even though there is evidence to support the fact that an application of that size must I have the approval of TM. As for the other point, though TM may change his mind not to give a licence to Sabah Foundation in respect of the Wallace Bay area that does not change the fact that before that happened the

Wallace Bay area was earmarked for Sabah Foundation. It was then **A** contended that the statements in those letters 'express in inchoate form the idea that the proceeds of the area [will] be [used] to build stadium and complexes on behalf of the State Government' which idea was given 'precision' by the agreement executed by Seranum and the government on June 12, 1975 under which, all that Seranum would get was 10% of the cost of construction with no obligation to construct anything unless and until the **B** timber proceeds were made available. Mr Cherryman QC had also submitted that:

> (1) any intention indicated by the government that any of the 20% management reserve areas recovered would be given to the Sabah Foundation was conditional upon the income from the timber being used **C** only to construct sports complexes on behalf of the Government (unlike the 3,000 sq miles that was given unconditionally) and Seranum was only an agent of the government as evidenced by the 12 June 1975 agreement; and
>
> (2) the beneficial interest in the income from the timber areas recovered and granted to Seranum was at all times vested in the government not **D** Seranum.

Thus, it was contended by Mr Cherryman QC, Seranum 'cannot be heard to complain against DSK when its principal, the State Government, decided to give Wallace Bay area to Banita' and that the Sabah Foundation has no case at all. These contentions will be dealt with after the relevant **E** legal principles are looked into. For this purpose, this is the opportune moment to again remind myself that the plaintiffs accused DSK of being 'guilty of a fraudulent and dishonest design and acted in breach of his duty as director of Sabah Foundation and as managing director of Seranum in that': (1) he failed in his entrusted duty to cause the whole of the surrendered area to be given to Sabah Foundation or Seranum; (2) he made **F** use of the opportunity and knowledge acquired by him as fiduciary agent of the plaintiffs to make a profit for himself, for Banita or for unknown persons to the detriment of Sabah Foundation; and (3) he fraudulently concealed from the trustees of Sabah Foundation and board of directors of Seranum the fact Banita had applied for and been granted a licence over the Wallace Bay area and he failed to disclose his control and financial interest in Banita. **G** What, then, are the relevant legal principles governing the matter?

What was the legal position of DSK ?

There is no doubt that DSK owed fiduciary duties to Sabah Foundation **H** and Seranum, being respectively the director and managing director. DSK was a fiduciary. Those positions are well-recognised as giving rise to a fiduciary relationship. They have certain characteristics which have been described by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at p 18, in these words:

> **I** A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation

> A of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn B pointed out in his classic work *Fiduciary Obligations* (1977) at p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

But it does not mean that anything he did which may be a breach of duty amounted to a breach of fiduciary duty. Thus, it was held in *Bristol and West Building Society v Mothew*, inter alia, that the solicitor's conduct in providing C the plaintiff with the wrong information, although a breach of duty, was neither dishonest nor intentional but due to an oversight and was unconnected to the fact that he was also acting for the purchasers; that, accordingly, his conduct and subsequent application of the money advanced by the plaintiff to complete the purchase was not a breach of trust D or fiduciary duty. In *New Zealand Netherlands Society Orangje Incorporated v Laurentius Cornelius Kuys* [1973] 1 WLR 1126 the plaintiff, who was the secretary of an incorporated society, founded and published a newspaper under the name of 'The Windmill Post.' The society claimed ownership of the newspaper on the ground that the plaintiff was in a fiduciary position as secretary of the society and had acquired the newspaper while he held that E office and by virtue of it. The society launched a similar publication with the same name and the two almost identical newspapers circulated simultaneously. The Privy Council held: (1) that the plaintiff's fiduciary position and responsibilities as secretary of the society did not exclude the possibility that the publishing of the newspaper was a separate arrangement and one which the plaintiff owed no fiduciary duty to the society and, since F the judge had found that there was such an arrangement and there was an established set of facts which fully displaced any potential fiduciary obligation, the plaintiff did not hold the newspaper in trust for the society. Therefore, the mere fact that DSK was respectively the director and managing director of Sabah Foundation and Seranum does not mean that every duty of his was of a fiduciary nature. What must be determined is the G obligations DSK owed as a fiduciary and in what respect he had failed to discharge those obligations (*Securities & Exchange Commission v Chenery Corporation* [1943] 318 US 80 at p 85, referred in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 at p 636 (CA)).

H The obligations of DSK are to be determined in relation to the areas of 12 concessionaires and more particularly the Wallace Bay area. In my view, as soon as the government had evinced its intention through the cabinet decision and letters to give to Sabah Foundation or its group of companies those areas, DSK would be expected to protect that interest or expectation. It was such an interest or expectation because unless somebody took away I the Wallace Bay area it was as good as Sabah Foundation's. It matters not that the Wallace Bay area (together with the rest of the areas) came with the condition that the profits to be derived from exploiting the Wallace Bay area were to be used for building stadium and sports complexes in every major town in Sabah because it still had its benefit, the 10% remuneration under the 12 June agreement and the construction of stadium and sports complexes which fitted the charitable objectives of Sabah Foundation. Therefore DSK was under an obligation to protect it. Any action on his part which had the result of reducing the size of the area to be given to Sabah Foundation or its group would be a breach of that obligation. For DSK, through Banita, to apply for the Wallace Bay area which was intended to be given to Sabah Foundation or its group, soon after the government had expressed that intention was, in my view, clearly a breach of his fiduciary obligation to protect the interest of Sabah Foundation or its group. As soon as the Wallace Bay area was given to Banita instead of to Sabah Foundation or its group that completed the breach of duty on the part of DSK. It matters not that TM was the final authority for the issuance of the licence nor that it was TM who approved the licence to Banita because had it not been for the application of Banita the Wallace Bay area would not have been taken away and it was the fiduciary duty of DSK to ensure that it was not taken away and his fiduciary duty required him not to apply, through Banita, for the Wallace Bay area. It was, therefore, no less a breach of fiduciary duty on the part of DSK when Banita applied for and obtained a licence for the Wallace Bay area just because TM decided to give away the Wallace Bay area to Banita.

If really TM had out of the blue made a gift and identified the Wallace Bay area, which can be regarded as among the best areas in terms of extraction and quality of timber, then DSK would have been duty bound by his conscience of equity to say: 'TM, I cannot take it. That area together with others is meant as the source of fund for Sabah Foundation to carry out its activities in accordance with the Cabinet Papers. You are the chairman and I am the director of Sabah Foundation. There are other timber areas which you can give me.' I could even add, it being a notorious fact that school uniforms, milk, exercise books and shoes were at about that time being freely distributed to primary school children, that DSK should also have said: 'TM, the school children, especially the poor ones, may be deprived of their school uniforms, milk, exercise books and shoes if the area is taken away.' In my view, he as a trustee of Sabah Foundation was duty bound to prevent the Wallace Bay area from being taken by Banita; what more when he was the eventual or ultimate beneficiary.

It does not matter too that the June 12 agreement, assuming it had that effect, had made Seranum an agent of the government to carry out the construction of the stadium and sports complexes because there was a gain, in the form of 10% payment under cl 7 of that agreement, to be derived by Seranum under that agreement. This income had been reduced through the Wallace Bay area being shanghaied by Banita and which thus reduced the fund available for the construction of stadium and sports complexes. That in turn reduced the amount which Seranum would obtain.

That what I have described is a clear case of breach of fiduciary duty on the part of DSK will be made outstanding or glaring when the facts of this case are compared with those of decided cases. Let me stress that the

A comparison is merely for the purposes of illustration and not for the purpose of making a conclusion that because in those cases there was a breach of fiduciary duty it must necessarily be so in the present case; this is because each case depends on its own facts (*Coomber v Coomber* [1911] 1 Ch 723 at p 728).

B In *Aberden Railway Co v Baikee Bros* (1854) 1 Macq 561 a managing partner of a firm was also the chairman cum director of a railway company. The firm and the company entered into a contract under which the firm sued the company for refusing to accept delivery of chairs. The court there, at p 471, said this:

> C A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to D protect.

It was held that it was his duty to the company to obtain the lowest possible price but that his personal interest would lead him to an opposite direction.

In *Re The French Protestant Hospital* [1951] 1 Ch 567 it was held that as: E (a) the directors, though not technically trustees, were in the same fiduciary position as trustees in respect of the affairs of the corporation; and as (b) they were accordingly debarred by the rule of law relating to trustees from receiving payment for their services, it was improper for them of their own motion to introduce a by-law of the kind proposed, and that such a by-law was prima facie 'repugnant to law'.

F The case of *Regal (Hastings) Ltd v Gulliver & Ors* [1967] 2 AC 134 is another example concerning, among others, the directors of a company. The action was based on the allegations that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves with a view to enabling them at once to sell them at a very substantial profit. That they had obtained that profit by using their offices G as directors and solicitor and were therefore accountable for it to Regal. And that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. It was argued for the directors that they had to come up with the money personally to purchase the shares in Amalgamated after the company had failed to raise H the necessary fund for future development through the acquisitions of other cinemas by using its subsidiary Amalgamated and the directors were acting as members of the public when they bought the shares. That argument was rejected by the House of Lords and the directors were held liable to account to the company for the profits.

In the present case it is difficult to see, given the scope of DSK's duties I as the director and managing director respectively of Sabah Foundation and Seranum, how the act of the Wallace Bay area being shanghaied by Banita can be anything but the result of a breach of fiduciary duty on the part of

DSK. Therefore the plaintiffs have established that DSK had failed in his duty to cause the whole of the surrendered area to be given to Sabah Foundation or Seranum. In coming to that conclusion I have, as urged by Mr Cherryman QC, put the matter through various tests which evolved from the three rules governing a trustee, viz: (1) 'the no profit rule'; (2) 'the no conflict rule'; and (3) 'the misuse of trust knowledge rule'. I will now elaborate on how the facts of this case satisfied those tests.

Although a director who obtains a benefit while holding office as a director is liable to account under the rule that a trustee may not profit from his trust ('the no profit rule'), it has to be proved that the director obtained the benefit by reason and in the course of his office as a director (*Regal (Hastings) Ltd v Gulliver & Ors* at p 145). The House of Lords in *Regal (Hastings) Ltd v Gulliver & Ors* at p 156, had this to say when deciding there that the shares came by simply because of their position as directors:

> The analysis of the facts in the present case which has been made by Lord Russell of Killowen shows clearly enough that the opportunity and knowledge which enabled the four respondents to purchase the shares came to them simply in their position as directors of the appellant company. Wrottesley J., clearly so held. He said at the outset of his judgment:
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> > 'There is no doubt they (the respondents) did take up in their own names shares which only a few days and certainly only after a week or two they able to sell at a very large profit indeed. There is no doubt that it was only because they were directors and solicitor respectively of the plaintiff company that this stroke of fortune came in their way.'

This test was applied in *Peso Silver Mines Ltd (NPL) v Cropper* (1966) 58 DLR (2d) 1. There the board of directors of a mining promotion company considers a new venture which is offered to their company by an outsider and bona fide comes to the conclusion that it is not an investment which the company ought to make. Individual directors later contacted the outsider and put up their own money for the speculation. It was held that those directors did not violate any duty to the company or profit by reason of and in the course of their fiduciary position in the company even though the new acquisitions are mining claims neighbouring the company's holdings and are purchased by the individual directors upon the advice of the company's consulting geologist. The court there also held that the director when later approached was approached as an individual member of the public and that therefore the shares acquired by the director was not by reason of the fact that he was a director and in the course of the execution of that office.

Mr Cherryman QC then argued that the Wallace Bay area was a gift from TM and it was accordingly acquired not by reason of the fact that DSK was a director nor in the course of the execution of that office. Did DSK, then, obtain the benefit of the Wallace Bay area by reason and in the course of his office as a director? When looking for the answer, all the relevant facts must be considered. Though it is true that unless TM approved, no one could get any timber area or a licence to such timber area which was of a certain size like that of the Wallace Bay area, it must not be forgotten that the concessionaires areas were not the private property of TM

A for him to give away to the detriment of the intended recipient Sabah Foundation. The circumstances leading to Banita getting that area or licence must be taken into account for a correct appreciation of the facts before it can be answered whether it was obtained by reason and in the course of his office as a director.

B DSK was at all material times the director of Sabah Foundation, a charitable institution established by statute and which, it goes without saying, will forever require finance if its objectives are to be met. Thus, the law was amended on 29 December 1967 to empower the Sabah Foundation to apply for and operate timber areas as a means of generating funds. DSK knew all this because he was then the director. Following all these events the C Cabinet Paper was put up which resulted in the resumption of many square miles of timber areas from the 12 concessionaires, including the Wallace Bay area, and these areas were to be the source of the fund for activities of Sabah Foundation. DSK knew all this because he was appointed, as a result of the Cabinet Paper, the chairman of the negotiating team which 'negotiated' the resumption of the timber areas. It is unthinkable that such D an exercise, the taking away of timber areas from 12 concessionaires, was for the purpose of distributing the areas for free to any individual or company unconnected with the government or Sabah Foundation and even less thinkable when Sabah Foundation had already been identified as the recipient of the resumed areas. Therefore, DSK being its director had a duty to ensure that whatever timber areas that were intended for Sabah E Foundation or its group of companies must end up with them and not elsewhere. This would be his duty and his obligation from the time he became aware of the fact that the funding of the Sabah Foundation or its group of companies was to be derived from the timber areas of the 12 concessionaires whatever variations or modifications may result later. F Nothing must be done to dilute what was going to go the way of Sabah Foundation, least of all by DSK or his company Banita. This obligation became more onerous and obvious when DSK, as director of Sabah Foundation, received a letter dated 23 May 1970 from TM which assigned Sabah Foundation the task of establishing the corporate mechanism to benefit the people of Sabah pursuant to the Cabinet Paper. For this purpose G an area of 3,000 sq miles (plus an area for management reserve) was to be carved out from the areas taken back from the 12 concessionaires and this was made clear by the grant of that area on 28 December 1970 to Sabah Foundation. The corporate mechanism was implemented by the formation of three companies, with DSK as the managing director, for operating the area, selling the timber. By the later part of 1971, the demarcation of the H areas and what the choice areas were became known since Sabah Foundation was to start extracting timber on 30 sq miles, being the first annual coupe, as soon as possible. Pausing here, one could ask whether at this juncture it would have been proper for DSK or Banita to apply for the Wallace Bay area? The answer is surely no because DSK knew that the areas were intended for the purposes mentioned in the Cabinet Paper which was I to source the fund for Sabah Foundation to carry out its objectives and DSK, being then director of Sabah Foundation, was surely duty bound to protect this source of fund. A depletion will surely occur if the size of the areas is to be reduced by DSK or Banita taking a chunk off it. At this juncture, if DSK or Banita had applied for the Wallace Bay area it would surely be a breach of fiduciary duty and what DSK or Banita had obtained would surely be obtained by reason and in the course of his office as a director. That those areas were to be given to Sabah Foundation were expressed, not in inchoate terms, but clearly spelt out or mooted in the Cabinet Paper, agreed to by the state Cabinet and confirmed by correspondence which I have already referred to. If DSK had not been the director he would not have known of the areas going to Sabah Foundation and had the area then been obtained by DSK or Banita, it was in the course of his office as a director since details of the allocation of the areas to Sabah Foundation were made known to him both as the director of Sabah Foundation and chairman of the negotiating team. If what DSK or Banita had then obtained would be regarded as having been obtained by reason and in the course of DSK's office as a director, what, then, had changed since that time so that by 29 July 1974 (the date Banita applied for the Wallace Bay area) or 4 April 1975 (the date the licence was issued to Banita) the acquisition of the Wallace Bay area could not be so regarded? Mr Cherryman QC had adverted to the Wallace Bay area being a gift by TM, that DSK was under no duty to refuse the gift and that the area was subject to the condition that the proceeds be used to build stadium and sports complexes. As for the question of gift, it had not been elaborated and I cannot, in any event, see how it can change the fact that by that time, DSK was still the director of Sabah Foundation and was fully occupied with the affairs of Sabah Foundation and with finding suitable areas for logging. The gift, if ever it was that, was made by TM when DSK was a director and while DSK was in the course of finalising the selection of areas to be taken back from the 12 concessionaires to be given to Sabah Foundation and therefore was given and received by DSK in the course of his office. As for the question of DSK being under no duty to refuse the gift, I have earlier dealt with and rejected the argument. As for the condition that the proceeds be used for building stadium and sports complexes, here again, I am unable to see how such a condition renders what otherwise would have been the acquisition of a benefit by reason and in the course of his office as a director into one which is not.

I turn now to the question of the second test that arose out of the 'no conflict rule'. Mr Cherryman QC on this aspect of the case had referred the court to the following passage in *Sargeant v National Westminster Bank Plc* (1990) 62 P & CR 518 at p 519:

> The rule that a trustee must not profit from his trust holds that prevention is better than cure. While it invariably requires that a profit shall be yielded up, it prefers to intervene before hand by dissolving the connection out of which the profit may be made. At this stage the rule is expressed by saying that a trustee must not put himself in a position where his interest and duty conflict. But to express it in that way is to acknowledge that if he is put there not by himself, but by the testator or settlor under whose disposition his trust arises, the rule does not apply.

Mr Cherryman QC had argued that there was no conflict and that in any event DSK was put in that position by TM when TM gave the licence to

A Banita. I will deal with the latter point first. The case of *Sargeant & Anor v National Westminster Bank Plc & Anor* concerned a testator who had let to his three children Joseph, Charles and Hilda three farms which the children farmed in partnership. By his will he gave his residuary estate, including the farms, to his trustees on trust for sale and conversion where ultimately on his death the capital was to be held on trust for such of his children as should B be alive at his death, if more than one in equal shares. Clause 11(iv) of the will states:

> Any of the Trustees of this my Will shall have power to buy any portion of my estate real or personal either by private treaty or public auction including the right to bid at any public auction notwithstanding that he or she is a Trustee C of this my Will and in the event of a sale by private treaty the price shall be such as shall be agreed upon between the Trustee so buying and my other Trustees and in default of such agreement then at a price to be determined by the valuation of two different persons (one to be nominated by each party) or by an Umpire to be chosen by the two valuers.

The testator died in 1969 followed by his widow in 1973. Charles died D intestate in 1974. Joseph and Hilda exercised their right under the partnership to acquire Charles' share under the partnership They also wished to purchase the freehold of one of the farms and sell the others. The Court of Appeal held: (1) cl 11(iv) was an entirely general provision which permitted any trustee to purchase the trust property and that its effect was to exclude a purchase by the trustees from the operation of the rule which E disabled a trustee from purchasing the trust property; and (2) although the trustees were in a position where their interest as tenants might conflict with their duties as trustees, it was not they who had put themselves in that position and the administrators of Charles' estate could not complain of the trustees' continued assertion of their rights as tenants. The reasons for the court's decision are at p 523 where this is said: F

> ... They have been put there mainly by the testator's grant of the tenancies and by the provisions of his will and partly by contractual arrangements to which Charles himself was a party and of which his representatives cannot complain. The administrators cannot therefore complain of the trustees' continued assertion of their rights as tenants.

G In the present case the appointment of DSK as a director and consequently a trustee was not by virtue of any will but pursuant to the Enactment. The Enactment did not provide any exemption from the 'no conflict rule' in respect of the kind of transaction urged on behalf of DSK. Another thing to bear in mind is that TM cannot be likened to as testator who made bequests H of his properties since the Wallace Bay area did not belong to him though he may have a power to allocate it. Therefore, factually the case of *Sargeant & Anor v National Westminster Bank Plc & Anor* is so completely different from the present case as not to be of assistance. This case, I am in agreement with Mr Mann QC, does not come within the principle expounded there.

I turn now to the remaining question of the second test which is I whether DSK had placed himself in a position of conflict. The no conflict rule has also been mentioned in the quoted passage of *Sargeant v National Westminster Bank Plc.* The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect (*Boardman & Anor v Phipps* [1967] 2 AC 46; *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Shah Mohd & Ors* [1997] 2 CLJ 607). Mr Cherryman QC in contending that DSK was not in any position of conflict had said these:

> 9.1 The plaintiffs appear to rely on two facts in support of its submission that DSK put himself in a position of conflict. Firstly, that Wallace bay was earmarked for the Sabah Foundation. Secondly, DSK was the Director of the Sabah Foundation and he therefore owed fiduciary duties to the Sabah Foundation.
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> 9.2 As to the first fact relied on by the plaintiffs the defendants repeat their submissions set out above in their Outline Closing Submissions.
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> 9.3 As to the second fact the defendants submits:
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> (1) the fact that DSK owed fiduciary duties to the Sabah Foundation at the relevant time does not mean that anything he did and which may have been a breach of duty amounted to a breach of fiduciary duty [see *Bristol and West BS v Mothew* pp 16C–17E];
>
> (2) the plaintiffs have failed to define the scope of DSK's *fiduciary* duty and identify in what way that fiduciary duty has been breached;
>
> (3) the evidence clearly indicates that DSK was granted a timber licence of Wallace Bay at the behest of TM and he did not, therefore, put himself in a position of conflict. Further, unless it is suggested that having been granted a licence DSK should in some unspecified way have tried to give the licence back and persuade TM to grant the licence to the Sabah Foundation instead, such a failure does not obviously fall into any recognised category o breach of fiduciary duty;
>
> (4) the fact of the matter is that TM granted to DSK a timber licence to extract timber from Wallace Bay without in any way DSK procuring the grant of that licence [see the unchallenged evidence of DW3 – Haji Rahmat NP315, lines 22–30].
>
> The defendants submit that DSK was not in a position of conflict in accepting the grant of a timber licence over Wallace Bay from the CM and/or that he did not place himself in such a position even if there was a conflict. Further, if the acceptance of the timber licence and failure to try and persuade TM give it to the Sabah Foundation was a breach of duty, such a breach was not a breach of fiduciary duty.

I have already earlier dealt with the matters of the submissions 9.1, 9.2, 9.3(1), (2) and (3) and found against DSK. As for the evidence of Haji Rahmat, the then private secretary of TM, mentioned in 9.3(4) of the submission, it is merely this:

> Q When was the last occasion you received such instruction from TM.
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> A If I remember correctly, in 1974. TM telephoned from London and asked me to let Said Keruak acting CM know and also Kassim to issue about 4 timber licences. One was to Sabah Foundation company, one DSK company, one to Trusmadi, a company of Toh Puan Rahimah Stephens and the fourth to Nabahu, a company of Peter Mojuntin but

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> TM told me to delay the licence to Trusmadi and Nabahu. That is all I can remember.

There must be an application for a licence before the same can be considered and granted. As mentioned much earlier, Banita applied for the Wallace Bay area on 29 July 1974 and was issued the licence on 4 April 1975. Nothing in that evidence would assist the contention of the defendants that DSK was not in a position of conflict. By submitting the application for the licence which evinced his interest in the Wallace Bay area, DSK was, I agree with Mr Mann QC, in actual conflict with the interest of Sabah Foundation in the opportunity which the government's policy afforded it of implementing its statutory charitable objectives by the route the government intended and earning contractual remuneration in the process.

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C

As for the third test, it concerns the 'misuse of trust knowledge rule' which is that a trustee may not use for his own purposes knowledge acquired by him as trustee. It is upon this rule that the plaintiffs' claim is also framed and which pleadings I have earlier referred to, viz that DSK made use of the opportunity and knowledge acquired by him as fiduciary agent of the plaintiffs to make a profit for himself, for Banita or for unknown persons to the detriment of Sabah Foundation. The knowledge takes the form of 'the value of the timber stands'. The general principle of law is again not in dispute and I need only refer to *Phipps v Boardman*, at p105 per Lord Hodson, where it is said:

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> The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person

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And also at p 107 where it is said:

> I agree with the learned judge and the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust. It was obtained by Mr Boardman by reason of the opportunity which he was given as solicitor acting for the trustees in the negotiations with the chairman of the company, as the correspondence demonstrates. The end result was that out of the special position in which they were standing in the course of the negotiations the appellants got the opportunity to make a profit and the knowledge that it was there to be made.

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Again, it ought to be said that not every knowledge learned by a trustee in the course of his duties is the property of the trust unless it is information which is given him '(i) in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone, for it has been given to him expressly or impliedly as confidential; or (ii) in a fiduciary capacity and its use would place him in a position where his duty and his interest might possibly conflict.'(*Phipps v Boardman*, per Lord Upjohn at pp 128–129).

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Mr Cherryman QC in this aspect of the case submitted that the information is not trust property. This is how learned counsel submitted:

> … any information that DSK received in relation to the value of the timber stand in Wallace Bay was given to him in his capacity as the Chairman of the Negotiating Team and not in his capacity as the Director of the Foundation or as a director of Seranum. Therefore, it cannot be said that the selection of Wallace Bay over any other area amounted to a breach of fiduciary duty because any information as to the value of Wallace Bay came to him in his capacity as the Chairman of the Negotiating Team and not as the Director of the SF. A breach of duty is not found simply because DSK as the Director of the SF was a trustee who owed fiduciary duties but only if the grant of the special timber licence amounted to a personal interest which conflicted with a specific duty he otherwise owed to the SF.
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> The first allegation [Referring to the knowledge of the timber stand] could not stand in the light of evidence that Sario's surveys were all done on behalf of the Government Negotiating Team to whom his reports were all addressed.

So, Mr Cherryman contended that it is not trust property because the information about the Wallace Bay area came to him as the chairman of the Negotiating Team. In order to put the matter in its proper perspective, the relevant facts must be appreciated. These are that DSK was made a director of Sabah Foundation in 1968 thereafter the Cabinet Paper was prepared in 1969 and later approved by the Cabinet which resulted in DSK being appointed the chairman of the negotiating team for the purpose of taking back from the 12 concessionaires certain timber areas which were to be given to the Sabah Foundation. Those areas had to be identified and information relating to such areas is surely, in my view, of interest and concern to the Sabah Foundation which was represented at that time by DSK. The secondment of Inocencio Sario to the Sabah Foundation, though he assisted and made his reports to DSK, was for the purpose of identifying the areas for Sabah Foundation and therefore he was serving the interest of Sabah Foundation. Right from the beginning DSK was made aware that the areas to be taken back from the 12 concessionaires were for the purposes of Sabah Foundation and any information relating to those areas is trust information. In this regard I am in agreement with Mr Mann QC that though DSK was negotiating on behalf of the government he was also carrying out the government's purpose to give the returned areas to Sabah Foundation and he was throughout a director of Sabah Foundation which meant he owed fiduciary duties to Sabah Foundation while being chairman of the negotiating team. The government can be taken not only to have known that he was the director of Sabah Foundation but also that in good faith he would be bound to pass on the knowledge that came to him in the course of the negotiating team's work. There was after all no possibility of conflict between the government's interest and that of Sabah Foundation and therefore DSK was under no constraints with regard to the knowledge he was at liberty to pass on to Sabah Foundation and to himself as the director; which argument of Mr Mann QC I again agree with. Therefore, the plaintiffs have also succeeded in this limb of their claim. I turn now to the third allegation of fraudulent concealment.

Whether DSK fraudulently concealed from the trustees of Sabah Foundation and board of directors of Seranum the fact Banita had applied for and been granted a licence over the Wallace Bay area

What has been established is that the board of trustees of the Sabah Foundation and the board of directors of Seranum were not informed of the fact of the application for and the grant of the licence over the Wallace Bay area to Banita. This question is more relevant to the issue of whether what was done was with the knowledge and assent of Sabah Foundation and Seranum. There is no dispute here that there was no informed consent from either.

Having made the findings that I have done which showed a clear breach of fiduciary duty on the part of DSK, there remains the question of the remedies. The questions of dishonesty and fraud will be considered when the remedies to be awarded are discussed and which I am going to do next.

Remedies

It will be recalled that the relief sought against DSK and Banita is principally for an account of the profits and damages. The relief claim is both restitutionary and compensatory. Before the defendants can be asked to account, there must be a sufficient nexus between the fiduciary position and the money made out of it (*Phipps v Boardman*, at p 118). The working of this principle had been illustrated in the following speech of Stephenson LJ in *Swain v Law Society* [1981] 3 All ER 797 at pp 809–810:

> In *Reading v R* [1948] 2 All ER 27 at p 28 … Denning J in a part of his judgment cited with apparent approval in the judgment of the Court of Appeal … said:
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> > 'In my judgment, it is a principle of law that, if a servant takes advantage of his service by violating his duty of honesty and good faith, to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to his master.'
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> Later in his judgment … Denning J distinguished 'the mere fact that his [Readings's] service gave the opportunity for getting the money' from 'the wearing of the King's uniform and his position as a soldier' which was 'the sole cause of his getting the money', and stated that the first fact would not entitle the master to the money, whereas the other two matters would. I do not think that the opportunities of gain provided by a fiduciary position can never of themselves render the person who has them accountable for the gain, or that Denning J intended so to hold. All the facts and circumstances of the particular case must be taken into account before accountability for the particular pecuniary advantage is established.
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> When the facts and circumstances of this case are considered the commission is seen plainly to come to the Law Society from, or by virtue, or by reason, or by means of, its fiduciary position. It is because the Law Society, empowered by Parliament to arrange for indemnity insurance, has appointed itself a trustee for the benefit conferred on solicitors by their contracts under

> the terms of the master policy that it has put itself in a position, or acquired the opportunity, to arrange with LIB to be paid commission. The Law Society's own use of its fiduciary position to make the bargain of 11 May 1976 with LIB cannot prevent the fruits of that bargain from being derived in reality from the use of that position. A

So, the facts and circumstances of the case must be considered for the purpose of a decision on accountability. I have already referred to the facts and circumstances when I considered and found that DSK was in breach of his fiduciary duty and I have already explained why it does not matter that DSK was wearing two hats, that of chairman of the negotiating team and of director of Sabah Foundation and I have also explained why it does not matter that it was TM who had approved the licence to Banita. It suffices for me to say that what I have said earlier is applicable to this question of accountability. It is impossible not to conclude in this case that the Wallace Bay area and its timber licence came from or by reason or by means of the fiduciary position of DSK. The area was discovered when DSK was in charge of retaking the area from the concessionaire for the purpose of it being given to Sabah Foundation. He was at all material times the trustee for Sabah Foundation and was entrusted with the task of channeling that area to Sabah Foundation. DSK made use of that position and the information obtained to apply for and obtain the Wallace Bay area. As a result, Sabah Foundation (or its group of companies) lost the Wallace Bay area which otherwise would have come to it. The causal relationship between the act of DSK or Banita and the loss of the Wallace Bay by Sabah Foundation was established. B C D E

Though it does not appear to be disputed that Banita was merely a vehicle of DSK I have, given the circumstances and facts of this case, no hesitation in concluding that DSK was the person who ultimately caused Banita to apply for the Wallace Bay area and its licence and DSK was therefore Banita's mind, DSK's intention its intention and DSK's knowledge, its knowledge (*El Ajou v Dollar Holdings Plc* [1994] BCC 698). It appears to me that Mr Cherryman QC had in his closing speech conceded that if DSK is liable to account for the profit, Banita would similarly be liable, I will not dwell on this matter any further nor on the question of the lifting of the veil of incorporation. F G

This leaves the question as to how much or to what extent DSK and Banita should account for. Mr Cherryman QC submitted: (1) no damages can be awarded because there is evidence to say that the government would have directed Seranum to stop building stadium and sports complexes and the area would not have been given to Seranum upon the cancellation of the licence or alternatively; (2) the most the plaintiffs are entitled to is the sum of RM673,900 or RM1,385,500 being calculated by reference to the 10% remuneration which the plaintiffs would have benefited from under the 12 June Agreement. H

As for the first of the contentions, that no damages can be awarded because there is evidence to say that the government would have directed Seranum to stop building stadium and sports complexes and the area would not have been given to Seranum upon the cancellation of the licence, the I

A short answer to that proposition can be found in the speech of Lord Russell in *Boardman v Phipps* at p 134, where he said:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or B whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by this action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

C Mr Cherryman QC had further submitted that the plaintiffs, in view of the fact that the building of stadium and sports complexes may be stopped and that the Wallace Bay area when it was taken back was not given to Sabah Foundation, were not persons 'to whom the benefit might properly to accrue', quoting from *Tengku Abdullah v Mohd Latiff Shah Mohd & Ors* D [1997] 2 CLJ 607 at p 635, and that therefore neither DSK nor Banita needed to account. Another way of putting what Mr Cherryman QC is contending is this — that because whatever profit would in any event not have gone to Sabah Foundation or Seranum, DSK or Banita need not account for the profit they have derived from exploiting the timber of the Wallace Bay area. This calls for an examination of *Tengku Abdullah v Mohd* E *Latiff Shah Mohd & Ors* to see whether that case really laid down such a proposition of law as Mr Cherryman QC contended.

That case involved two suits and they are concerned with the promoters of a proprietary club who had been held to be fiduciaries of those who participated in it. Members of the club had sued, among others, two F appellants who had the majority shares in two companies, which I will refer to briefly as RDB and Allied. RDB owned the land upon which the clubhouse was to be built while Allied was incorporated for the purpose of building the clubhouse. All the shares of RDB were later sold to Allied which paid for them by the issue of Allied shares and by assuming debt liability. RDB then amended its memorandum of association to permit it to G carry on the business of the club. It also resolved to issue 2,200 shares which could be purchased from Allied by the 2,200 intending members of the club. There was a further allotment of RM19m worth of shares to Allied. RDB then engaged Allied to build the clubhouse at a cost of RM19m which sum Allied acknowledged receipt of and which probably went towards payment of the RM19m worth of shares. Allied then applied to turn RDB H into a public company but was rejected by the Capital Issues Committee which suggested the formation of a society. Thereafter a protem committee for the club was formed with the defendants elected to hold certain posts and this protem committee met and formed a membership committee with regard to the question of membership of the club and this committee designated people who were to be members. The protem committee also I admitted the two appellants (and others) as members of the club. The protem committee met again later to discuss a draft sale and purchase agreement under which the entire issue and paid up capital of RDB was to be purchased by the club from Allied at RM47m; that had the result of purchasing the clubhouse which Allied had contracted with RDB to build. The interested defendants declared their interest in the contract and abstained from voting on the matter when the agreement was approved. Those shares were intended to be resold by the club to intended members of the club. At that meeting Allied was appointed manager of the club. An EGM of the club was then held but notice of the meeting was not given to all the persons who had been designated as members and who would be footing the cost of RM47m for the purchase of the shares from Allied. At this EGM, the two defendants did not disclose their interests and it approved the share acquisition agreement and the appointment of Allied as manager. After the club was properly registered it held its first AGM whence it was discovered that there were additional costs for the land and building for which the club had to bear an additional sum of RM16m. An ad hoc committee was appointed to look into the matter and its report was critical of the two defendants (among others). Allied, having received RM41,168,896, sued the club for RM8,409,997, which it claimed was the balance due under the share acquisition agreement and also for interest. The club counterclaimed, among other things, the return of RM16,571,734 on the ground that the shares were overvalued and were worth only RM24,597,162, that the share acquisition agreement was tainted with undue influence. Allied responded by asking for a declaration that the share acquisition agreement was void and unenforceable and that the members of the club restored all benefits under the share acquisition agreement to Allied and Allied would refund all moneys it received to the club; the Court of Appeal held this latter claim of Allied to be doomed to failure but I need not concern myself with the reasons. The club took out an action against the two defendants (among others) for damages for breach of fiduciary duty. The Court of Appeal held that the lower court was correct in ordering Allied to return to the club the difference between the fair price for the construction of the clubhouse and the sum the club had actually paid Allied. This sum was found to be RM15,450,876 (RM41,168,876 to RM25,718,000). The Court of Appeal also upheld the judgment for the club against the two defendants (and others) for damages to be assessed for breach of fiduciary duties. The words relied on by Mr Cherryman QC were spoken in that case in the following context, at p 635:

> For the purpose of deciding the present appeals, we find it unnecessary to undertake a survey of the historical development of the jurisdiction of a Court of Equity by which one in whom confidence was reposed ('the trustee') was disabled from obtaining for himself any benefit from a transaction falling within the scope of that confidence, to the exclusion of the person reposing confidence and to whom the benefit ought properly to accrue ('the beneficiary'). Suffice to say that the jurisprudence, that was originally applied to trustees and beneficiaries *stricto sensu*, was, over a period of time, extended on a case by case basis to other relationships akin to a trust. For the purposes of the present appeals, we find it unnecessary to discuss the extent, if any, to which the extension was influenced by the Roman concept of a *fideicommissa*.

It is obvious from the context in which the words were relied on that they were not spoken in relation to the question of the award of damages or relief but in relation to the development of the jurisdiction of a Court of Equity. They cannot be construed as laying down a principle of law that narrowed down the liability of a fiduciary to account and with the result that the fiduciary is entitled to still reap or keep the profit which he came by as a result of his breach of duty as a fiduciary. In fact the Court of Appeal was of the opinion, when it shared the view, expressed in a passage in *Canadian Aero Service Ltd v O'Malley & Ors* (1973) 40 DLR (3d) 371 at p 383, that the law may require a reformation of existing principle to maintain its vigour in the new setting. To restrict recovery of the profit and to allow a fiduciary to retain the ill-gotten profit is not a progressive development of the law and this is not what the Court of Appeal approved of. Clearly then it was not the intention of the Court of Appeal to lay down such a rule. The strictness of this rule was applied in *A-G for Hong Kong v Charles Warwick Reid & Ors* [1994] 1 AC 324 where it was held:

> (1) that a gift accepted by a person in a fiduciary position as an incentive for his breach of duty constituted a bribe and, although in law it belonged to the fiduciary, in equity he not only became a debtor for the amount of the bribe to the person to whom the duty was owed but he also held the bribe and any property acquired therewith on constructive trust for that person; that if the value of the property representing the bribe depreciated the fiduciary had to pay the injured person the difference between that value and the initial amount of the bribe, and if the property increased in value the fiduciary was not entitled to retain the excess since equity would not allow him to make any profit from his breach of duty; and that, to the extent that they represented bribes received by the first respondent, the New Zealand properties were held in trust for the Crown, and the Crown had an equitable interest therein.

Furthermore, it is not a requirement that the fiduciary must benefit at the expense of the beneficiary and support for this proposition can be found in the case of *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443. The facts of that case are these. The architect defendant was the managing director of the plaintiffs, one of a group of companies offering construction services to large public and private industrial enterprises. The defendant's duties included procuring new business for the plaintiffs, particularly in connection with the gas industry and from the gas boards. From 1968, the plaintiffs were interested in a project by the Eastern Gas Board to construct four depots and unsuccessful negotiations took place between the defendant, on behalf of the plaintiffs, and the board. At the end of May or the beginning of June 1969 the deputy chairman of the board approached the defendant for advice in his private capacity about the affairs of the board. They met on June 13, when the defendant became aware that if he could quickly obtain his release from the plaintiffs he would have a good chance of obtaining for himself a valuable contract from the board. At that meeting the defendant acquired knowledge and information not possessed by the plaintiffs, and which the plaintiffs would have wished to possess. On June 16, the defendant obtained his release from the plaintiffs as from the end of July by representing dishonestly that he was in ill health. The plaintiffs would not have agreed to release him if they had known the full facts about the board's projects or the events of June 13. The defendant was subsequently given the contract by the board as a result of work which, unknown to the plaintiffs, he had done while still the plaintiffs' managing director. The plaintiff sued for an account of the profits. The defendant's argument in that case was summarised in this manner: A

> ... true some directors are in a fiduciary relationship with their companies but when the defendant saw Mr Smetton on 13 June Mr Smetton made it plain that he was consulting the defendant not as managing director of Industrial Development Consultants Ltd. but in a private capacity. Therefore, what the defendant did on 13 June and thereafter was not done quo managing director of the plaintiffs. The information he received was not received quo managing director of the plaintiffs. On the contrary the information was given and received in a purely private capacity. There was thus no breach of any duty, even the barest contractual duty, in failing to pass that information on to the plaintiffs. Still less was there any breach of any fiduciary duty because, having regard to the fact that this information was received by the defendant in his private capacity, there could be no fiduciary obligation to pass on this information to Mr Hicks or to his employers generally. B C
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> The argument continued that, that being the position, the defendant did not and could not have got this valuable Eastern Gas Board work by virtue of his position as managing director of the plaintiffs. Indeed, the converse of that was true because the defendant could never have got that work so long as he was their managing director. Therefore, none of the requirements indicated in some of the cases which have been referred to, notably *Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134, have been satisfied. D E

The court there, at p 448–449, dismissed that argument in these words:

> I think the right approach to the present case is first to consider the duty which a director (including a managing director) owes to the company of which he is a director. This has been the subject of repeated statements in cases of the highest authority over the years. The law is summarised in *Buckley on the Companies Act*, 13th ed (1957), pp 876-877: F
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> > 'Upon general rules of equity a person holding a fiduciary position as director cannot obtain for himself a benefit derived from the employment of the company's funds, unless the company knows and assents. No director can, in the absence of a stipulation to the contrary, partake in any benefit from a contract which requires the sanction of a board of which he is a member. He stands in a fiduciary position towards the company, and if he makes any profit when he is acting for the company, he must account to the company. It makes no difference that the profit is one which the company itself could not have obtained, the question being not whether the company could have acquired it, but whether the director acquired it while acting for the company, nor that the interest of the director is as a trustee for a third party. The reason for this is, that the company has a right to the services of its paid directors as an entire board; that it has a right to the advice of every director upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with the trust funds applies with still greater force to that state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance.' G H I

It follows that the second argument of Mr Cherryman QC that the amount recoverable should only be the 10% remuneration must for the same reason fail and it should also fail since that proposition if accepted would have the result of allowing the fiduciary to retain profit earned as a result of the breach of fiduciary duty which is against the strict rule of equity that a fiduciary in such circumstances must account. It must be borne in mind that this case concerned a fiduciary who had acted wrongly for his own benefit and the law is he must disgorge the benefit (*v Phipps; Canson Enterprises Ltd v Boughton & Co* [1991] 2 AC 663; *Swain v Law Society* [1981] 3 All ER 797).

Whether DSK was dishonest is, I agree with Mr Mann QC, of relevance as it has a bearing on compensation and the quantum. I am compelled by the facts and circumstances of this case which I have already set out and commented on to conclude that the conduct of DSK from the time Bania applied for the area to the time Banita was granted the licence to the detriment of Sabah Foundation or Seranum was clearly dishonest. DSK lost his balance of propriety when he caused Banita to apply for the Wallace Bay area knowing very well that the area was earmarked for Sabah Foundation or its group of companies. His failure to inform the Board of trustees of the Sabah Foundation that Banita had applied for a licence of the Wallace Bay area and which had the result of reducing the size of the area going to Sabah Foundation or Seranum makes the dishonesty more obvious. DSK, even assuming that he was on a slippery slope and was expected to lose his balance, had the opportunity to regain his balance when it became known that there was not enough timber area to accommodate the application of Banita unless Banita gave up its application in favour of Seranum but instead of doing so he proceeded with the application of Banita, without informing either the board of directors of Seranum or the board of trustees of the Sabah Foundation, at the expense and to the detriment of Seranum whose interest it was his duty to protect. That puts beyond any doubt there was dishonesty on the part of DSK and that it was not an innocent error of judgment of his part.

Restitutionary remedy means accounting to Sabah Foundation and Seranum the profit derived from the Wallace Bay area while the compensatory relief is simply the loss consequent upon the cancellation of the licence. What, then, is the profit which DSK or Banita had derived which they must account to Sabah Foundation and Seranum? Of course, whatever amount it will be pro tanto so that DSK and Banita will not have to account twice over. Since DSK did not himself work the Wallace Bay area, whatever profit can only be gathered from the books of Banita to whom the licence was issued. However, the books of account were not forthcoming and this led to Mr Mann QC to complain about the behavior of the defendants, more particularly their failure to disclose the documents as was their duty. What was disclosed was the 1978 accounts which showed the retained profits of RM6.4m that were carried forward. Since there is no evidence that Banita was into anything but timber operations, it can be assumed that the profit came from the operation of the Wallace Bay area. Mr Mann QC had rightly submitted that what the court is concerned with when the question of disgorgement of profit is considered is not what Sabah Foundation or Seranum would have been entitled to under the agreement but what profit DSK or Banita had earned. Not all accounts of Banita were produced by the defendants. The balance sheet for the period ending 30 September 1978 shows that Banita had a retained profit of RM6,417,915 while that for the period ending 30 September 1989 shows a retained profit of RM6,188,938.00. Since the reduced sum may have been the result of a distribution of the profit I would take the profit of RM6,417,915 which DSK and Banita will have to disgorge. The accounts of the earlier years of 1975, 1976 and 1977 during which Banita operated the Wallace Bay area were not produced and I am unable to discern as to what profits had been made during those years and whether the profits had been distributed as to result only in the retained profit shown in the 1978 account. This failure to disclose the accounts on the part of the defendants was not attacked during the discovery stage of the proceedings and it was not until the time Mr Mann QC took over this case that it was realised that the accounts were missing and an application was made for the production of those documents which application made practically on the day of the trial and some twenty-years late was refused by me. In the course of the trial, I had the occasion to remark that the failure to produce those accounts may be the subject of adverse comment on my part as to the conduct of the defendants. This resulted in some of the accounts (and other documents) being produced by the defendants. SSA proffered the reason that he was not told by his advocates that it was the defendants' duty to produce the same. If that was true, that is a serious breach of duty on the part of the advocates concerned. But since the advocates were not given a chance to say whether what SSA said was true, I am not prepared to blame the advocates for the defendants for this failure to disclose and produce.

In this aspect of the claim, my conclusion is that the plaintiffs are jointly and severally entitled to recover from DSK and Banita the sum of RM6,417,915. I will hear further argument as to the award of interest.

Mr Mann QC contended that Sabah Foundation and Seranum are also entitled to another sum being the compensatory relief and that is the damages resulting from the cancellation of the timber licence for the Wallace Bay area with Mr Cherryman QC again maintaining that the plaintiffs are only entitled to the said 10% . This aspect of the case was put in the following words by Mr Mann QC:

> The licence had a further eightyears to run and there remained some 14,870 acres unlogged (B2/526A; BG/92). The court is respectfully referred to and to prefer the evidence of PW 15 (Pinso), PW16 (Chung), PW 14 (Mannan) as to the quality of the timber and the probable net proceeds of extraction. Further, given that compensation is to be awarded on the basis of breach of a fiduciary obligation, the court should make no assumption that the plaintiffs would have done any worse or operated at a lower margin than Banita. It should, furthermore, be disinclined to make substantial allowances for topographical and other possible differences between the logged and unlogged areas. Accordingly, the court is respectfully invited to assume a margin of 50 per cent and minimum extractable volume of 70 per cent. The figure the plaintiffs claim is RM 65,862,767 (RM 65.86m) 50 per cent of which is RM 32.93m.

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> It is not proposed argue the merits of Mr Hiu's evidence (DW 7) since it was clearly of little probative value. The Court is, however, respectfully invited to review his cross-examination.

Compensation would mean putting the plaintiffs to the position they would have been in if they had not sustained the wrong and that is a measure of B the difference between their present situation and what their situation would have been but where the breach of fiduciary duty was fraudulent (which I would, in the circumstances of this case, equate with dishonesty and as being the same) then the defendants are liable to restore the plaintiffs to the situation they were in when the defendants did them wrong (*Swindle v Harrison* [1997] 4 All ER 705 at pp 714, 715). In so far as the claim on C the non-disclosure is concerned, it is not open to the defendants to say that the disclosure would not have made any difference (*Swindle v Harrison* at p 716) and thus the defendants cannot be heard to say that the Wallace Bay area may not necessarily go to the plaintiffs even if disclosure was made. Another way of describing the manner of determining the compensation can be found in *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785 D at p 798:

> Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.

E As for the causal link, I have already concluded that there was causal link when I considered the issue of accountability of profit and what I said there applies equally to this issue of compensation.

It will be recalled that the timber licence granted to Banita was cancelled by the government with effect from 31 December 1976 while it F still had eight years to run. The past undisputed production and sales record of Banita was taken for the purpose of calculating the profit margin. For this purpose, it was argued by Mr Mann QC that the same volume of timber that could be expected to be extracted per acre for the remaining unlogged areas (which the government had taken back as a result of the cancellation of licence) and the same profit margin of 50% should be applied. Mr Mann G QC had acknowledged that the remaining areas are in a more hilly terrain but he said no discount should be allowed without saying why. It has to be accepted that the more hilly the terrain the more the cost will be in the extraction of the timber. Thus you cannot apply the cost of extraction as that for a flat area with roads already formed. In this aspect, I agree with Mr Cherryman QC. This is beyond argument because Cerilinus Tan, a forestry H consultant, also said the extraction cost would be much higher if it is from an area situated in a steep terrain. Generally, the same timber specie would be found in the unlogged areas as found in the areas already logged. In this regard I accept the evidence of Sam Manan who so testified relying on maps drawn and statistics gathered as to the kind of timber to be found and in what areas. In any event, the defendants did not offer any evidence to the I contrary. I would therefore accept that the timber in the remaining area would fetch a price similar to that of timber already sold from the logged areas.

Mr Robin Chung, a valuer, testified for the plaintiffs and he explained how he extracted from the records of Banita, the averages prices of the timber and the cost of production and the profit all of which Mr Cherryman QC did not dispute in so far as the calculations produced the figures. This witness was of the view that the projected gross profit of remaining areas should be RM37,652,905 but he agreed that it is not right to use the cost of extraction that was actually incurred for the remaining areas because there will be a need for building access road and because the terrain is hilly. Even that figure appears not to have been pursued because Mr Mann QC had referred to the lower claim of RM32.93m which is based on a margin of profit of 50%. Though Mr Cherryman QC had correctly submitted that the 50% margin cannot apply he did not go further to suggest what that margin should be. The production cost is made up of different components, one of which is the extraction cost and this is the only relevant item as regards the added cost of production resulting from logging in a more hilly terrain. This extraction cost made up about 50% of the total cost of production which means that a 10% increase in the extraction cost would result in a 5% increase in the overall production cost. It is not possible to go any further with regard to specifics, that is by what extent would the extraction cost be increased as a result of the hilly terrain. The best I can do is to allow a lower profit margin to take into account the increased costs of production resulting from the hilly terrain and this would reduce the gross profit. I would disallow another 15% for the gross profit and this means the amount of compensation for the plaintiffs is the sum of RM23.05m. As for interest, I will hear both counsel further.

Conclusion

For Suit 352, judgment shall be entered for the plaintiffs jointly and severally against the defendants jointly and severally for the combined sum of RM29,467,915 with costs to the plaintiffs. As for the issue of the payment of interest on this sum, I will make a decision after, as mentioned earlier, I have heard learned counsel for the parties. I turn now to Suit 351.

SUIT 351

Introduction

In Suit No 351 of 1979 ('Suit 351') the plaintiffs are the same Sabah Foundation and Seranum but with the addition of Sinsuran Sdn Bhd ('Sinsuran') while one of the defendants is also DSK with Zara as the other defendant. The plaintiffs' claim against DSK:

- (a) a declaration that DSK is accountable to the plaintiffs for profits resulting from the enhancement of Zara Land;
- (b) an account of the profits;
- (c) an order for payment of the sum found due; and or alternatively,
- (d) a declaration that DSK is accountable to the plaintiffs for committing them to certain development projects, an account of such loss and an order for payment of the sum found due thereon.

As against Zara the plaintiffs claim:

(a) a declaration that it is a constructive trustee for the plaintiffs of Zara Land to the extent that the same has been enhanced in value;

(b) an account of all profits made by it as a result of the said enhancement; and

(c) an order for payment of the sum found due thereon.

Interest, accounts, enquiries, directions and damages are also claimed against both DSK and Zara. The claim is founded on various projects that were started allegedly to benefit DSK though carried out by Sabah Foundation or Seranum or Sinsuran. These projects are described in the statement of claim in the following terms:

5 On 16 November 1972, after substantial areas of Zara Land had already been acquired by the first defendant and the said associated individuals and companies, the first defendant in his capacity as Director of the first plaintiffs applied to the State Government for the alienation of 1,780 acres of swamp land at Menggatal Forest, an area immediately adjoining Zara Land, for the ostensible purpose of utilising the said area for development for raising the living standards of Bumiputras and the beneficiaries of the trust then known as the 'Amanah Tun Datu Haji Mustapha'. The said application was subsequently approved in principle but the area reduced to approximately 1,095 acres.

6 On the 19 April 1973, after further areas of Zara Land had been acquired by the first defendant and the said associated individuals and companies, the first defendant in his capacity as Director of the first plaintiffs applied to the State Government for the alienation of 730 acres of State land, being another area immediately adjoining Zara Land, for the ostensible purpose of utilising the said area as the site for the permanent campus for the Yayasan Sabah Institute of Technology Mara (YS-ITM). On 10 May 1973, the first defendant in his aforesaid capacity applied to the State Government for the alienation of a further 400 acres of State land in the same area for the said purpose. Thereafter the first defendant acting in his said capacity procured for the first plaintiffs a total of 1,462 acres of land for the said purpose adjoining Zara Land and procured the commencement of earthworks thereon in September 1974.

7 On 13 January 1975, after the completion of the acquisition of Zara Land, the first defendant in his capacity as Director of the first plaintiffs awarded a contract for $1,706,406.20 for the piling of a site situated within Zara Land for the purpose of the erection thereon of a 30 floor headquarter building (hereinafter referred to as 'the Tower Block') in Zara Land, thereby committing the plaintiffs to proceed with this project, and on the 5 May 1975, the first defendant procured the first plaintiffs to enter into an agreement with the second plaintiffs which provided for the second plaintiffs to construct (inter alia) the Tower Block on the said site in Zara Land at an original estimated cost of M$30m. Thereafter the first defendant procured the second plaintiffs to carry out piling for the Tower Block which was completed on the 31 December 1975 and to commence work on the construction of the Tower Block which began on the 12th February 1976.

8 On the 17 January 1975, after the completion of the acquisition of Zara Land, the first defendant procured the first plaintiffs to apply for 200

> acres of seabed in the Likas Bay area between Kota Kinabalu town and Zara Land and subsequently to apply for a further 932 acres of seabed in the same area. In May 1975, the first defendant in the name of the third plaintiffs prepared and submitted to the State Government a paper entitled 'Proposal for the promotion and long term implementation of the development of land-based public recreation/leisure facilities in the Kota Kinabalu region', which proposed, inter alia, the alienation of the foreshore in the Likas Bay area to the third plaintiffs, the construction of a coastal highway linking Kota Kinabalu town with the proposed site for the Tower Block in Zara Land and the development by the third plaintiffs of the area on the landward side of the proposed new coastal road as a scenically attractive outdoor recreational area, and which was on the 30 June 1975 accepted in toto by the State Government. Thereafter, in October 1975, the first defendant procured the third plaintiffs to enter into a contract for the causeway construction, for the new coastal road; and construction of the said causeway was duly commenced.

The statement of claim went on to allege that DSK was 'guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty as director and subsequently as trustee of Sabah Foundation and as managing director of both Seranum and Sinsuran in that:

(1) he made use of the opportunity and knowledge acquired by him as their fiduciary agent to commit the plaintiffs to implement two projects, viz: (a) the building of the Sabah Foundation Tower; and (b) the construction of a coastal highway for his own or primarily for his own benefit and not bona fide in the interest of the plaintiffs;

(2) the sole or primary purpose of DSK in so committing the plaintiffs was to enhance the value of Zara Land for the benefit of the defendants by providing Zara Land with amenities and prestige focal point and by substantially improving both practically and environmentally the access and approaches to Zara Land from the town of Kota Kinabalu;

(3) he so committed the plaintiffs without the authority or knowledge of the Board of Trustees of the Sabah Foundation or of the Board of Directors of Seranum and Sinsuran; and

(4) he failed to disclose to the Board of Trustees or the Board of Directors his own personal interest in the projects.

DSK and Zara delivered a separate defence. That DSK is a fiduciary who owed Sabah Foundation, Seranum and Sinsuran duties is not disputed. What is disputed is whether DSK took those actions or decisions and if he did whether those actions or decisions were taken for the sole or primary purpose of benefiting DSK or Zara and whether they amounted to a breach of fiduciary duty. It is also an issue whether by those actions or decisions, if found to have been taken, DSK was 'guilty of a fraudulent and dishonest design'.

Facts of case

Much of the facts already narrated in Suit 352 are relevant to this suit and I do not propose to restate them here. It was in 1968, not long after DSK became the director of Sabah Foundation, that DSK and SSA made exploratory trips by plane and boat over land situated a few miles north of Kota Kinabalu and found the land to have great potential for development as a tourist resort with ancillary commercial and residential development in the immediate future and that the land would be a natural extension of the town of Kota Kinabalu in the future. Zara Project was thus visualised by DSK and SSA. It was in 1969 that they began the painstaking task of purchasing the various lots that form part of the land ('Zara Land') upon which Zara Project was to be constructed. The location is shown in a map that will be referred to later. The area of Zara Land eventually comprised 2,452 acres of which 1,007 acres were applied for from the government. The title to Zara Land was later issued to Zara which was formed on 30 January 1970 to take over the land assembled and to be purchased by DSK and others (including TM) in exchange for shares in Zara. DSK and SSA were the first directors. Another Zara's shareholder is a company called Segama Sdn Bhd ('Segama'). The shareholders of Segama consisted of DSK, SSA and Datu Salam Bin Datu Harun, a brother and nominee of TM. Of the 1,007 acres obtained from the government, 965 acres were by Segama (who exchanged them for shares in Zara) with the balance of 42 acres by Zara. The speed in which the four applications for the 1,007 acres of land were approved deserves mention because its importance will be commented upon later. The first application was made on 28 December 1970 and approved on 19 January 1971, the second on 6 September 1971 and approved on 8 September 1971, the third on 15 January 1972 and approved on 11 February 1972 and the fourth application on 29 December 1972 and approved on 4 January 1973. It will be noted that one application was approved within two days of the application while the longest it took for an approval was 27 days. There was also an application by Segama for 10 acres on 3 February 1972 for the purpose of the construction of the cable-stay bridge and this was approved eight days later on 11 February 1972. With the land all assembled, Zara awarded the contract for the construction of the said bridge on 29 June 1972 to provide access to Zara Land. Zara Land was constituted under one title that was issued to the name of Zara on 1 July 1975. One of the terms of the title is that the land is to be developed into a tourist complex with related commercial, residential and associated development accommodating the objective of DSK and SSA. Another term is that 60 acres of the land are, among others, reserved for government buildings.

In February 1976, which was a few months before a new government was formed and before DSK ceased being a director of Sabah Foundation, Zara shareholders exchanged their shares for shares of a company called Zaraland Sdn Bhd, with DSK and SSA as first directors, which then became Zara's holding company. DSK was at all material times in control and had substantial direct or indirect beneficial interest in Zara and was its directing mind.

In March 1974, TM had announced to the press that a 21-storey headquarters was to be built and the newspapers carried an artist impression of a squarish building. Though the title containing the terms was only issued on 1 July 1975, Zara knew of these terms because the consultants employed by Zara had as early as July 1974 (in a document called Memorandum on the Development of Zara Project) referred to those terms and made allowance for them when preparing the papers for Zara Project. Instead of the previous design for the headquarters of Sabah Foundation, a circular building was preferred ('the Tower') and this was to be sited at Zara Land. The disputes call for an appreciation of the location of Zara Land and I would adopt the description given by the defendants' consultants which is in these terms:

> Zara Project encompasses an area of some 2,480 acres stretching 3.5 miles from north to south and varying in width to nearly 2 miles across. It is located along one of the most attractive stretch of beaches in Sabah, with the western shore facing the South China Sea. The entire area is like a peninsula separated from the mainland by two rivers with Sungei Menggatal defining the north-east boundary and Sungei Inanam, the south-east.....
>
> With its excellent beaches, panoramic views from the hills, welcome seclusions in lagoons and inland lakes, this site has the obvious potential of becoming a haven for resort activities at local, regional and international levels. The off-shore islands of Gaya, Manutik, Manukan and Pulau Sapi are within convenient boating distances and are delightful unspoilt islands where the sea is crystal clear for skin diving amongst safe coral reefs.
>
> The project site is dominated by an elongated north-south central highland rising to a maximum height of 650 feet above sea level in the northern section. This hilly topography offers excellent vantage points overlooking the sea against the background of the colourful western sky and the splendid views of rolling terrain of the hinterland to Mount Kinabalu on the east. The southern hill offers a magnificent view of the Likas Bay with Kota Kinabalu Port just visible in the distance. The clean white beaches are separated by rocky spurs, forming natural coves which are ideal for beach resort community development. The natural palm-fringed foreshore gives an attractive tropical character to the entire western coastline.
>
> The eastern side is bounded by the placid tributaries of the two rivers, Sungei Menggatal to the north and Sungei Inanam to the south. These delightful waterways lead to magnificent natural inland lakes where boats may anchor safely in all kinds of weather at sea. This natural asset should encourage the development of exciting lake resorts for yatching, boating and skiing.
>
> The project area is about 5 miles from Kota Kinabalu and about 6 miles from the International Airport with excellent road accessibility skirting the site. This makes Zara location an ideal resort complex with its added tranquility and apparent remoteness.

The land was acquired by the government on 1 October 1976 and compensation of which, now together with interest would be about RM100m, had been frozen by an injunction. The plaintiffs contend that this substantial award would not have been made had DSK not used his position to influence the giving of development approvals for and to involve the Sabah Foundation in Zara Project. This will be elaborated on when I consider the issues. This is the convenient place to pause to consider the issue regarding the decision to build the Tower.

Whose decision was it to build the Tower on Zara Land?

Though the undisputed evidence of Rahmat Bin Ma'dom, a long-serving private secretary of TM is that it was DSK's idea to build the Tower, I do not feel confident in accepting his evidence because he was recollecting from memory something that had happened about 26 years ago. Unless he is aided, for example, by contemporaneous documents recording the events at that time, it is just not possible for an ordinary human to be able to recall a particular event, like that meeting in December 1973, especially when there were so many meetings since TM saw DSK regularly. He also said it was TM's idea that it should be sited on Zara Land after the civil aviation prohibited the location of the building in Kota Kinabalu town on account of its proposed height but all this information could only have come from meetings involving TM but this witness had said he did not attend any of the meetings as he was not required to and thus it is not possible for him to have heard TM deciding on the site. Therefore, his evidence cannot be relied on as supporting SSA's assertion that there was a meeting in 1973 between DSK and TM when TM decided on siting the Tower on Zara Land. Tengku Zainal Adlin Bin Tengku Mahamood, who was the Sabah Foundation group project manager from 1974 to 1980 said he was the one, after discussion with DSK, SSA and other proponents of Zara Project, in 1974, to choose the site for the Tower. SSA, in contrast to Rahmat Bin Ma'dom, said that it was TM's idea in early 1973 to have a building of his own and to site it on Zara Land. Mr Cherryman QC had submitted that because TM was all powerful and brooked no opposition (a view well supported by the opinions of almost all the witnesses who testified on this point) and who was very keen in the affairs of Sabah Foundation, it was natural that TM would be the one who had decided on siting the Tower on Zara Land. Learned counsel also submitted that though DSK may have put his ideas to TM it was TM who took all major decisions affecting Sabah Foundation and DSK carried them out. This issue must be looked at taking the surrounding circumstances existing at the relevant time. As far back as 1969 DSK had begun assembling lands for Zara Project and by 1974 the conceptual plans and structure plan for Zara Project were already in print. In fact the importance of siting the Tower at Zara Land was recognised by the consultants in their said July 1974 paper because, according to them, the building will contribute to the Zara Land being a focal point. By October 1974, the development plan for Zara Project was approved in principle. Even assuming it was in December 1973 that TM decided that the building should be sited on Zara Land it was still Zara's decision since it was the owner of the land and since DSK was also the directing mind and will of Zara. Therefore, whatever role TM may have played in siting the building on Zara Land, it was nevertheless the decision of DSK and also that of Zara because ultimately DSK put his signature to the relevant documents which made it possible for the Tower to be constructed on Zara Land and it was done without reference to the Board of Trustees. Considerable thought must have gone into the concept of Zara Project before the July 1974 paper, which was prepared at the instance of the defendants and which extolled the benefit of having the Tower sited on Zara

Land. It cannot be true that DSK or SSA was unhappy that the building was sited on Zara Land when the siting of it on Zara Land would benefit Zara as not only the consultants were of that opinion but Tengku Zainal Adlin as well and the benefit, as will be considered later, was confirmed by a valuer. In fact, the term of the title providing for the reservation of part of Zara Land for such a purpose goes towards dispelling any doubt that DSK was not happy as otherwise DSK could have the condition removed as easily as getting the lands from the government within days of their application or getting the government to approve whatever terms put forward by DSK. Furthermore, the fact that there was no document to register Zara's dissent to the siting of the building on Zara Land belies the alleged dissatisfaction or unhappiness. Given the fact that TM had an interest in Zara it would be surprising that TM would have decided to site the building on Zara Land if it was to Zara's detriment. It would be more surprising for DSK not to have persuaded or advised TM and yet there is no evidence to suggest he did so. Given the fact that the parcels of land that were to make up Zara Land had already been identified as early as 1968, it is not inconceivable that by that time or a year or two later, DSK had a fair idea as to the form and shape Zara Project should take and what was needed to make it a success. Since the Tower was stated in 1974 to be a focal point, it is also not inconceivable that such a building being sited on Zara Land must have crossed the mind of DSK or TM, especially so when there was reservation of areas on Zara Land for such a building. In fact Zara Land was already being prepared for Zara Project as far back as June 1972 with the commencement of the construction of a cable-stay bridge which would provide vehicular access to the southern part of Zara Land. The realisation of the vision took on impetus when in January 1973 Zara accepted tender for the construction of a sea-wall and when in February 1973 Zara executed a contract for earth filling at one end of Zara Land. In fact, a lot of events were happening simultaneously or at around the same time, like the application for lands for Sinsuran and Seranum which I will refer to in more detail when the other issues are considered which all served to complement whatever was planned for Zara Project. Given the speed with which things were pushed and results obtained, like the purchase of the lands, the construction of a cable-stay bridge, the entering of the contracts for the sea-wall and earth work and the applications for land from the government by Segama and Zara which were approved within days of their applications, it would be out of character for DSK not to have by early 1973 thought of having a prestigious building like the Tower sited on Zara Land which their consultants confessed to being a focal point. Given DSK's influence, which I have mentioned earlier and which influence was further demonstrated by his ability to get those in power to follow his suggestion for the acquisition of land concerning the Menggatal Forest land or to limit the use of the foreshore, it is difficult not to conclude that he was the prime mover for the siting of the Tower on Zara Land. Even the relevant planning authority knew of the initial 21-storey building for the Sabah Foundation when it was mentioned in their meeting held on 17 August 1973 which means that the headquarters had already by that date been planned. Assuming for the moment that TM may have in December 1973 expressed the wish to have the building sited on Zara Land, A that does not mean that DSK did not want it. In my view, the circumstances of this case justify my conclusion that DSK's manipulative ability was leading TM's mind to a lot of decisions including that of having the Tower built and having it sited on Zara Land. I used the term manipulative because DSK was able to drag everyone of influence, like TM or the family of then deputy or acting Chief Minister, to take shares in Zara which facilitated the B obtaining of large chunks of land from the government and their concurrence to the many suggestions of DSK. Though Tengku Adlin had also said that Zara Project was affected by having some of their proposed high rise buildings reduced in height, that alone, for the reasons I have stated, cannot support the suggestion that DSK was unwilling to have that building on Zara Land because this witness had also said there are benefits C to have such a building on Zara Land. With TM being constantly absent from Sabah between 1972 and 1975 and appearing for two weeks after being absent for two months, DSK's role far from putting up ideas to TM only would actually be one of making decisions in relation to the affairs of Sabah Foundation. TM had no time for such matter as to siting of the D Tower and that explained why Tengku Adlin chose the exact site which would not have been the case if TM was so particular, as asserted by SSA, as to where the Tower should be located. TM was very comfortable with DSK since DSK was his advisor in so many things and TM trusted DSK implicitly not forgetting the fact that DSK had involved TM beneficially in the transactions I have earlier mentioned. Since TM also had an interest it E would be unthinkable that TM could not trust DSK not to rock the boat and therefore to decide on the Tower and its location in a manner not adverse to the interest of both TM and DSK. Both being in the same boat, it provides comfort and the sense of security for TM to trust DSK. It is just not probable that DSK somehow had nothing to do with the decision to site the Tower on Zara Land when it would affect Zara Land.

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There are other reasons why I am not inclined to accept that evidence of SSA. He was evasive and feigned incomprehension on ground of the complexity of a question which was uncomplicated and clear. For example:

> Q Generally to get cabinet ministers and TM to co-operate with him in giving effect to his plans for the Sabah Foundation and through you Zara Project
>
> G
>
> A I think I just lost the direction, counsel question too complex and long for me to grasp as to what he really means.

When it was put to him that whatever suggestion put up by DSK appears to H get approval and that bears testimony to his influence on the decision making of TM or the acting Chief Minister Tan Sri Said Keruak (whose family member also had an interest in Zara), as for example, the application which was approved for 1,780 acres of land at Menggatal Forest Reserve, SSA merely said: 'I have no comment. I did not write the letter.' There is no doubt that was one example of influence DSK had over TM and the I acting Chief Minister but yet SSA said it was nothing like that. Another example, which to me also demonstrates the influence of DSK, but which SSA lamely denied, was the occasion when Zara wrote on 25 July 1974 to the acting Chief Minister for adoption of certain measures or decision which Zara proposed and the very recommendations of Zara were not only accepted by the government but the exact words which made up the proposal and used by Zara were reiterated in the letter of the secretary for natural resources dated 27 September 1974. It is not only the denial that puts SSA's credibility in question but also his following agitated and incredulous statement (incredulous on account of the fact of the many instances which I have referred to as to how DSK seems to have his way and to get what he wanted):

> DSK was ... in no position to direct any body in government and I do not think anyone in government would have obeyed his direction any way, he was not in a position to influence that direction. I know that he did not influence. I have always known he did not. We never talked about influencing government.

SSA also refused to admit the indisputable like the fact that it was because TM trusted DSK that TM gave DSK his private affairs to look after and instead he argued that it was not because of the trust but because DSK was a *bumiputra*. He has to deny that because a trust established means confidence reposed which made it easy for DSK to have his ways in many of the matters I have referred to and lends support to the conclusion that DSK exerted considerable influence over TM and the acting Chief Minister. He also argued the unarguable like disagreeing with what was obviously in the interest of the acting Chief Minister to promote the interest of Zara because of his family's interest in Zara through their shareholding in Segama. His untruthfulness was also demonstrated by his attempt to convey the impression of his and that of DSK's helplessness and inability to do anything in opposing the imposition of the title condition for Zara Land which SSA claimed was dictated to by the government and detrimental to Zara Land. In many matters — like the applications for land or the suggestion for land to be acquired, the exemption of Zara Land from the operation of the Town and Country Planning Ordinance or the imposition of restriction on the use of the foreshore land – DSK had his way. All these suggest DSK to be a person who was very influential even over TM and the acting Chief Minister and it is inconceivable that he could not have his way when dealing with the bureaucrats over the title condition. Therefore, for SSA to suggest that he and DSK could do nothing when the title condition was imposed was an attempt to pull the wool over the court's eyes. DSK wielded too much power for anyone to believe that any bureaucrat would oppose him. It was, therefore, also not honest of SSA to have conveyed the idea that the government held the sword of Damocles over the nature of the development which Zara Project may undertake. The truth is that every thing revolved around Zara Project. Another aspect of his evidence that makes me wary of his evidence is his attempt to decry his involvement in the affairs of the Sabah Foundation. This was in relation to the construction of the sports complex that was undertaken by Seranum where a memorandum was addressed to him by the project manager of Sabah Foundation wherein two alternatives concerning payment were recommended. On this memorandum SSA wrote:

Second Alternative should be the answer for the time being.

[Signed by SSA] 13/5/76

He claimed that he was writing that note to himself, that he kept it in his drawer and that it was not part of a decision making process in which he was involved. That is an obvious untruth as it is unthinkable that the memorandum should be addressed to him and to him only containing the two recommendations that it was not for him to make a decision. Furthermore, this is the first time that I heard of someone writing to himself which Mr Mann QC had very mildly put as an disingenuous answer. What I have said thus is enough for me to conclude that SSA's evidence cannot be preferred. Given the circumstances, it was DSK's decision to build the Tower and have it sited on Zara Land.

What benefit does the Tower contribute to Zara?

It remains to be determined whether the detriment of siting the Tower on Zara Land must have really outweighed the benefit since it was urged that the Tower was detrimental to Zara Project and so it militates against DSK having made the decision to site the Tower on Zara Land. The defendants relied principally on the opinion of Mr Robert New ('New'), a surveyor and valuer and his opinion turns partially on his interpretation of the award made by the High Court in the land compensation case with regard to the acquisition of Zara Land. New's interpretation is that the court there did not consider the Tower to have made any contribution to the value of Zara Property and that the coastal highway had contributed insignificantly. It should be immediately said that I do not think the defendants were so asinine as to even think of urging let alone actually arguing in the land compensation case that the siting of the Tower on Zara Land and the construction of the coastal highway leading to Zara Property had increased the value of Zara Land. If Zara had so argued they would be disentitled to argue otherwise in the present case because they would not be allowed to blow hot and cold. *Allegans Contraria Non Est Audiendus*. See *Yamamori (Hong Kong) Ltd v Noel Kenneth Davidson & 3 Ors* [1992] 2 MLJ 410. This witness had also avoided the question of the Tower when he gave evidence in the land compensation case. Therefore, it was a futile exercise for this witness to have even tried to urge that the court in the land compensation case was impliedly of the view that the Tower did not enhance the value of Zara Land. The Tower was not an issue in that case and in any event the plaintiffs were not parties to that action. This witness had other reasons for saying the Tower did not benefit Zara Land. Though he recognised that the Tower may hasten the bringing of services beneficial for the initial development at the south tip of Zara Land and that the building may be helpful in marketing nearby development he nullified it by saying that there was no certainty in the hastening process and that Zara had already established a landmark in the form of the cable-stay bridge. He said the Tower gave rise to many factors resulting in it being detrimental to Zara Land and these are:

> 9 Sabah Foundation Building Factors Detrimental to Zara
> The following are the factors arising in relation to the SF Building that would be detrimental to Zara property:
>
> (a) That the building occupies the very best site in the whole of Zara property and blocks it off. Without this building the developer could have used this site to add value to a larger area of development land.
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> (b) The building is very dominant, necessitating that surrounding developments fit in with it. This limited the development options on surrounding lands including the height of development and the nearness of development to the S.F. Building.
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> (c) The building was clearly intended as a civic building with a minimum of commercial elements and this would have curtailed commercial development on surrounding Zara lands.
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> (d) Although the 7.00 acre site of the building was taken from the 60 acre allocation within Zara property reserved for Government uses, this 7.00 acres could, but for the building, have been allocated on lands with a fraction of the value of this the best site in Zara property.
>
> (e) The placing of such a large office development on Zara property offered the prospect, notwithstanding the fact that the Sabah Foundation would have occupied part of the building, of absorbing all new office demand in the locality for several years, thus creating an initial oversupply of offices at this location and delaying the commencement of profitable commercial development for Zara.

Since not only the issue of the impact of the Tower will be considered but also the question of whether the construction of the coastal highway benefited Zara Land, it is best to recount the events relating to the construction of the coastal highway here beginning with finding the answer to the question as to who decided on building the coastal highway.

Whose decision was it to build the coastal highway?

Kota Kinabalu town is about five miles from Zara Land and the most direct access from Kota Kinabalu to Zara Land was not available as the road system ends at the port area, located at Tanjong Lipat although a more circuitous road was available by way of Tuaran Road and then through Kampong Likas which lies about south of Zara Land. According to SSA (through his statement made in the land compensation case which the parties in this case agreed is relevant) the coastal highway was the result of government planning. This is what he said in the statement:

> 58 While all our preliminary work was being undertaken and our cable-stay bridge over Kuala Inanam was completed (September 1974), the Government's own plans for the building of a coastal highway from Tanjung Lipat to the new Sabah Foundation Headquarters Building site were put into effect. The coastal highway was to be a part of the Government's comprehensive and integrated Leisure Belt development for the Likas Bay area in which the Sabah Foundation itself has very substantial land interests.
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> 59 As this new coastal highway would clearly benefit two major developers with lands accessed by it, the State Government approached these

> developers, namely Sapan Development Sdn Bhd And Zara Sdn Bhd Both of these two companies were requested by the State Government to make contributions, financially and in kind, towards the construction of this proposed highway.
>
> Because the proposed coastal highway would certainly improve accessibility to Zara Project, we agreed in principle to meet half of its construction cost for the section between the drainage reserve adjacent to Sapan Development and Zara cable-stayed bridge. Our agreement was conveyed under Zara Sdn Bhd's letter dated June 09, 1975 to the Sabah Foundation and its wholly-owned subsidiary, Seranum Sdn Bhd, which had been appointed by the State Government to act as its agent in undertaking the development of the Leisure Belt for and on behalf of the State Government.
>
> 60 The construction of the coastal highway made available extensive new lands both in Likas Bay and between the new road and Kampung Likas. The Government decided to develop these lands, as well as seabed areas along the coastal highway, as a leisure belt. The tourist resort proposals for our project at the north end of the highway clearly fitted in ideally with these plans. Accordingly, when the Government set up a committee to coordinate development of this leisure belt, Zara Sdn Bhd was invited to be represented on the committee.

SSA said that it was TM's idea to have the coastal highway built. Mr Cherryman QC had also relied on other evidence, which I will refer to shortly, as establishing the fact that it was TM who decided on the construction of the coastal highway. This issue must be considered bearing in mind that many of the projects of the Sabah Foundation were conceptualised later than Zara Project. Zara Project was already referred to in a study entitled *Malaysia Visitor Development Programme* dated 28 February 1971 which was commissioned by the Government of Malaysia and I have no doubt that mention was made of Zara Project as a result of the feedback by DSK who was the chairman of the Sabah Tourist Association from 1970 to 1976. It was also the result of DSK's position in the Sabah Tourist Association that he was extended a copy of a letter dated 21 April 1971 from the Chief Minister's Department which talked of tourism promotion, the government's incentives and the construction of roads; this again came after Zara Project, which included tourist resorts, was already planned. In my view, it is plain to anyone looking at the map that the best and most direct route to Zara Project from Kota Kinabalu town was from Tanjong Lipat via the coastline of Likas Bay. Without that road access to the southern tip of Zara Land, it could only be reached by way of Jalan Tunku Abdul Rahman, then Jalan Tuaran and then by the service roads of Kampung Likas and the cable-stay bridge or alternatively by boat. This point is illustrated by a location map.

Even to the uninitiated, the map will immediately convey the picture that the best way to go from Kota Kinabalu to Zara Land is from Tg Lipat via the coast line. Bearing in mind that Zara Project was to be a tourist resort, a residential and office complex, an easy and the most direct access through the most scenic area would be of importance if one is to sell Zara Project and the coastal highway is the one access. Prima facie, the coastal highway would enhance the value of Zara Land. It is clearly unarguable, as attempted by New, that the coastal highway did not provide any appreciably better access to Zara Land than the existing access via the Tuaran Road and thereafter through the labyrinth of roads running through Kg Likas. Nothing illustrates the hopelessness of New's view better than a map showing the coastal highway and its obvious benefits, viz:

> That map puts beyond argument that the coastal highway was not only beneficial but vital as well to the Zara Project.

Given the foresight and influence of DSK and SSA, it is inconceivable that the route by a coastal highway never crossed their minds; in my view it was upper-most. DSK was influential as can be seen by the ease with which large tracts of land could be obtained by Zara or its associate Segama from the government. He was influential to the extent of being powerful, so much so that Zara was able to pre-empt any modification of the project by committing the government to agreeing to remove Zara Project from the future operation of the Town and Country Planning Ordinance. That Ordinance controls the use of land through a process of zoning and the power of which lies firstly with the local authority concerned, then the Central Town and Country Planning Board and finally His Excellency, the Yang di-Pertua Negeri of Sabah. The Ordinance confers no power on anyone to exempt Zara from the operation of that law and yet DSK was able to get an official letter exempting Zara from the operation of the law. I have also earlier said DSK was manipulative. Given what I have said, it is not difficult to see that DSK had an unseen hand guiding in whatever decisions relating to projects on or in the vicinity of Zara Project, like the siting of the Tower and the construction of the coastal highway since it cannot be such a coincidence that everything appeared to fit in so nicely with and to serve and benefit Zara Project. It is just not probable that DSK had wanted a different route which went through a Malay cemetery and Kampong Likas, notwithstanding the assertion of Tengku Adlin that it was the decision of TM to build the coastal highway. I agree with Mr Mann QC that there is no evidence at all of the decision making process as to turn the evidence in this regard of Tengku Adlin into some probative value. Furthermore, Tengku Adlin came onto the scene quite late, having been seconded to Sabah Foundation only in 1974 when most of the decisions had already either been taken or were in the course of being finalised. Tengku Adlin, unfortunately, was fond of taking credit, like the shape of the Tower which he said he decided without having to refer to TM, which is just not possible given the then stature of TM. He gave evidence, in my view, biased towards the defendants when he said that DSK was taken aback when he proposed the coastal highway instead of the road DSK had proposed. He volunteered the reason that DSK was unaware that DSK's proposed road went through a Muslim cemetery. It is inherently improbable given DSK's army of consultants and given the diligence and ability of SSA and DSK that DSK was unaware that a road proposed by DSK would go through a Muslim cemetery. They were able to find out and to locate each and every owner of the various parts of Zara Land in order to purchase from them yet was not aware of the Muslim Cemetery which a car trip would reveal if impossibly

A it was not revealed in any maps. This is incredible. This shows that Tengku Adlin was trying to offer an excuse as to why DSK did not choose the approach where the coastal highway was finally built. There is no evidence at all that DSK did not know about the cemetery from what Tengku Adlin said. Again, I am of the view that Tengku Adlin was trying to take credit for the construction of the coastal highway; again, the manipulative hand of B DSK at work. The proponents of Zara Project had no doubt set their eyes on the Likas Bay for a coastal highway long before Tengku Adlin joined Sabah Foundation in 1974 and it is just not probable that it was Tengku Adlin rather than DSK and his consultants who came up with the idea of the coastal highway. Given the fact that TM was for most of the time out of C Sabah and given his confidence and trust in DSK, whatever TM's role in the matter of the siting of the Tower and the construction of the coastal highway is, in my view, merely ministerial while DSK was actually the man behind the decisions.

That it was more likely than not that it was DSK who was responsible D for getting the coastal highway constructed can also be seen from the following sequence of events. A proposal — Proposal for the Promotion and Long Term Implementation of the Development of Land-Based Public Recreation/Leisure facilities in the Kota Kinabalu region: To be undertaken by Seranum Sdn Bhd (A wholly owned company of the Sabah Foundation for and on behalf of the Sabah State Government) was prepared in May E 1975 and one of the proposals called for the construction of the coastal highway and for Zara to share in the costs. Again Zara through either DSK or SSA had a hand in this proposal because it was mentioned in Zara's letter dated 9 June 1975 that they had numerous discussions relating to the proposal. In the said letter, addressed to the Director of Sabah Foundation and to the Managing Director of Seranum, both of which positions were F held by DSK, Zara, among others, proposed to contribute to 50% of the costs of construction of the coastal highway. Seranum's board of directors, consisting of DSK and another person, met on 10 June 1975 and adopted the proposals. Sabah Foundation then in a letter signed by DSK dated 12 June 1975 addressed to Zara accepted the proposal of Zara. This was G followed by an application by Sabah Foundation for 930 acres in Likas Bay to be vested in Seranum for the purposes mentioned in the proposals which helped to justify the construction of the coastal highway. The application was approved on 30 June 1975. Construction of the coastal highway started in October 1975 and it was completed in 1980. In the process of making all those decisions DSK never declared his interest in Zara. There is also no H record to show that the Board of Trustees of Sabah Foundation had agreed to construct such a road. Because the construction of the coastal highway benefited Zara Project with no detrimental effect, it provided the clearest indication that DSK desired it and thus he either made or caused the decision to be made to have the coastal highway built. It is beyond doubt that he decided on it if his influence, power, manipulations and if the trust I by TM in him are also taken into account. I have said that Zara Land had benefited because I, for the reasons appearing below, accept the evidence of the valuer Chong Choon Kim (Chong).

To what extent was Zara Land enhanced as a result of the coastal highway and the Tower?

What then, was the impact, if any, of the Tower and the coastal highway on the value of Zara property? I return now to consider the evidence of New, especially his reasons for his following conclusion:

> Having examined the required valuation scenarios for this case in two ways, firstly, by analysing the High Court award in OS 69/1977 and, secondly, by using conventional valuation techniques by reference to market evidence, I am of the view that neither the coastal road, the SF Building, the YS-ITM Campus nor the land application for the area of the Menggatal Forest Reserve Area had any beneficial impact upon the value of Zara Property on 14 October 1976. I am further of the view that the SF Building, in taking up the best 7.00 acre site in the whole of Zara property, in fact had a negative impact on the value of the property.

In so far as his conclusion that the Tower did not enhance the value of Zara Land is based on his interpretation of the judgment of the land compensation case, it cannot be accepted since, as I have said earlier, the court did not deal with that issue and the plaintiffs were not parties to that action. However, the amount of the award which represented the market value of Zara Land as determined by the court in that case can be used and it was ascertained as being RM40,929,011 as on 14 October 1975. New disagreed with the opinion of Chong who is equally experienced in this field as New and who had given evidence that the value of Zara Property was enhanced as a result of the siting of the Tower and the construction of the coastal highway together with other development or proposed development which I will refer to later. Because I find the basis upon which New gave his opinion as being faulty since it is premised almost entirely on his interpretation and reliance on his interpretation of the judgment in the land compensation case, I am of the view that the better way to approach the issue would be to examine his reasons for disagreeing with the opposing opinion of Chong to see if they are sound. Chong had given his opinion that the value of Zara Land without the benefit of the Tower and the coastal highway would only have been RM23,555,000; thus the value was enhanced by about RM17.374m.

Chong's approach to the matter is this. In order to determine the 'enhancement factor' and appreciation in market values of the two said projects he used the comparison method and for comparison he had chosen two areas, one to demonstrate the effect of the construction of a road (like the coastal highway) and the other the effect of a massive project (like the Tower). He chose the Sepangar Bay area, which is about 17 kilometres from Kota Kinabalu town centre, which is served by the Sepangar Bay Road. For the second purpose he had chosen Kampung Tambalang which then had the Tambalang Race Course under construction. What Chong did in order to find out the enhancement factor was to compare the performance of land, that is the movement of the prices, over a period of years in those localities to that of the general market performance as represented by double-storey terraced houses and double storey semi-detached houses over the same period.

His findings are that there was an increase in the value of the land situated in the vicinity of the Sepangar Bay Road after the construction of that road commenced in 1982. The increase is greater than the average general property market of Kota Kinabalu as shown in the following table:

Year	Average Property Market of Kota Kinabalu in %	Average Property Market of Sepangar Bay Road area in %	Difference in %
1983	0.00	+32.35	+32.35
1984	+1.00	+15.56	+14.56
1985	–23.50	+12.50	+36.00
1986	–12.50	+10.25	+22.75
1987	–11.00	+10.08	+21.08
Average			+25.35

Thus he arrived at an enhancement factor of 25.35% as a result of the construction of the Sepangar Bay Road which he applied to Zara Property on account of the construction of the coastal highway.

He conducted the same exercise in respect of the Tambalang Race Course which construction was commenced in 1981/1982. He also found that there was a greater increase in the price of the properties around that area as compared to the average general property market of Kota Kinabalu. The following is a table of the results of his research:

Year	Average Property Market of Kota Kinabalu in %	Average Property Market of the Tamabalang Race Course area in %	Difference in %
1982	+22.50	+21.37	–1.13
1983	0.00	+16.00	+16.00
1984	+1.00	+11.72	+10.72
1985	–23.50	+12.35	+35.85
1986	–12.50	+11.54	+24.04
Average			+17.10

This exercise produced an enhancement factor of 17.10% which he attributed to the contribution of the Tower to the value of Zara Property. New, though he accepted the approach of Chong, did not agree with the comparables used nor the conclusions. New gave reasons for his disagreement which I have summarised as follows:

1. There was no adjustment made for the two projects being at early stage of construction on 14 October 1975;
2. The comparables used were far from ideal resulting in the conclusion being invalid and the reasons for that is:

(a) the market for houses and for development land do not move precisely in tandem and development land prices are as much affected by building costs, finance costs and developers' profit margins as by house prices and therefore it was 'not very comparable to use house prices';

(b) the comparables are very small in size compared to Zara Land; and

(c) the period covers early and mid 1980 which is the period of the biggest boom and deepest recession and different from those in mid -1970's;

3 Sepangar Bay Area

(a) The road built to access the Sepangar Bay port and the comparables are known to have been bought for port related activities therefore one cannot tell whether the enhancement was due to the port or to the road and in any event the port contributes to a large percentage while Chong Choon Kim attributed the enhancement to the road only;

(b) Because of the poor road surface quality and longer distance from Kota Kinabalu, Kg Melawa, which is in the Sepangar Bay Road area benefits more from that road than Zara from the coastal road; and

(c) There was an existing road access to Zara Land via Tuaran Road and the coastal highway is only a probable additional road which may only have a small impact if at all.

4 Tambalang Race Course

(a) There was already improved access from Tuaran Road and market recognition of tourism potential resulting in a speculative market and, therefore, the enhancement cannot be attributed solely to race course. Furthermore, despite the closure of the race course in 1984 yet there was the biggest value increase in 1985 and 1986;

(b) The race course cannot be compared to an office building because the race course is in a relatively remote and undeveloped area which provided hope for development where there was previously almost none whereas the Tower is situated at the most valuable and accessible site and therefore did not gain from such hope which it would had the Tower been situated at a remote area of Zara Land;

5 There was no adjustment for completely different nature of Zara Property and no adjustment for the fact that northern tip of Zara Land which was 3 ʃ miles from the Tower and that has no vehicular access and unlikely to be affected by coastal highway and the Tower.

[They will be referred to as Reason 1, 2, 3, 4 and 5.]

As for Reason 1, it is common ground that you have to make adjustments but Chong maintained that he had allowed for those matters and the percentages had taken into account the adjustments made though it was not stated expressly. Though he appeared to later contradict himself by seeming to mean that he had reckoned the enhancement on the basis of the completion of the two projects but this was later clarified to mean the consideration of the two projects had to be reckoned over a period of time and he had taken that into account and not by reference to a specific time as when the two projects were completed. But he did not elaborate the allowance in percentage term for the adjustments which he claimed he had made. I am not satisfied that he had allowed for those adjustments since he recognised that the Tower and the coastal highway will take some years to complete. Reason 2 is an attack on the comparables used by Chong to establish the benchmark. New said that transactions of undeveloped land in similar proximity to Kota Kinabalu town as Zara Land should have been used instead of transactions relating to houses because, according to New: (1) the market for houses and for development land do not move precisely in tandem and development land prices are as much affected by building costs, finance costs and developers' profit margins as by house prices and therefore it was 'not very comparable to use house prices'; and (2) the land size of these houses are very small compared to Zara Land. In any event, New added, it was not right to take the period which Chong had done since that period covers the early and mid 1980's which is the period of the biggest boom and deepest recession and different from those in mid 1970's. Instead, New argued, the market benchmark should be reckoned by reference to nine transactions between 1974 and 1979 along Penampang Road and three transactions in 1973 and 1980 along the Likas Bay Road of undeveloped land which shows that a reasonably steady and stable market existed during that period without clear upward or downward movements. This contrasted with Chong's adoption of the general property market performance of the double-storey terraced and semi-detached houses in the Kota Kinabalu area as the market benchmark. Chong's benchmark shows the prices to move upward from 1979 and peaking in 1982 and then it went down from 1984-1987. It will be recalled that Chong then compared the movement of the land prices in the Sepangar area during the course of the construction of the Sepangar Bay Road and found that the prices moved upwards higher than that of the general market and hence his conclusion that it was due to the construction of the Sepangar Bay Road and that the coastal highway had a similar effect. Why should one choose the market of the said houses to establish the benchmark instead of the market of undeveloped land which is a more homogenous type of property as Zara Land? Chong explained that a true property market performance can only be established or gauged by reference to the greatest number of transactions and those houses made up the most; hence their adoption rather than those of undeveloped lands which transactions were few in number. New did not totally reject this manner of adopting the benchmark when he said this when commenting on Chong's method, viz:

> When undertaking any comparative exercise the comparisons most effective where the properties being compared are as similar as possible because this minimises the need for valuer judgment in making adjustment. It was for this reason that I looked for control evidence as well as evidence of property where the effect of a road or special project would be expected to show the effects of a special project and a new additional road that were of a light nature for easier comparison.

He went on to say that Chong's method would require a lot of adjustment. So, the method used by Chong to establish the benchmark is not wrong but only that it needed adjustment. In my view it is more preferable since it truly reflects the general property market price though not homogenous because undeveloped land transactions are few and far between and cannot therefore be used for establishing nor be said to constitute the market price. Another reason for rejecting New's method is that he had only selected transactions of undeveloped lands of Penampang Road and Likas Bay Road and not the undeveloped lands of Kota Kinabalu generally. New's next criticism which is comprised in Reason 2 goes towards the size of the comparables chosen by Chong but New had agreed that it was not possible to get evidence of another transaction similar to the size of Zara Land and that is why New had used comparables (of the Likas Bay Road and Signal Hill) which are also very small in size. The size therefore cannot be a legitimate complaint. Another complaint under Reason 2 is that the comparables were taken from a period covering the early and mid 1980's which is the period of the biggest boom and deepest recession and different from those in mid 1970's. It will be recalled that the Sepangar Bay Road construction commenced in 1982 and, therefore, in order the show the trend in the market, transactions before and after that date had to be reckoned even though it may involve period of boom and recession. Thus, Chong took as comparables a transaction back in November 1976 and thereafter transactions in every year ending up with the transaction in November 1987. All in all he took 37 transactions as comparables. That, in my view, is the correct way in arriving at the average price increase or decrease during the period 1976 to 1987 and to find out whether the construction of the Sepangar Bay Road played any part in the increase in the price even though it may cover a period of boom. I turn now to Reason 3, urged by New for the rejection of Chong's opinion which is that the comparables used are known to have been bought for activities related to the Sepangar Bay jetty which Mr Chong did not take into account. Since, argued New, those lands could have been bought for activities related to the jetty one cannot tell whether the enhancement was due to the road. Chong when examined on this point explained, plausibly and which I accept, that the road to be constructed was 12.5 km long and, thus, it cannot be true every transaction of the comparables he had used which were located intermittently on both sides and throughout its length was bought for that purpose. At most, it is only those concentrated at the locality of the jetty. In any event, Chong was of the view that the jetty played no part because he did not see any activity, such as oil tanker, being necessary for the conveyance of liquid petroleum product, being parked on such land; the jetty being used mainly for liquid petroleum product. There is no evidence, apart from the mere assertion of New that those lands were bought for the said related activities. The defence would have to call those owners which they did not and so failed to establish that point. Reason 3 complained that Kg Melawa, situated in the Sepangar Bay Road area, had only a road of poor surface quality and was further away from Kota Kinabalu and therefore benefited more from the Sepangar Bay Road than Zara would from the coastal highway which is only an additional access on top of the existing access via Tuaran Road and through Lg Likas. That is only a question of the adjustment to be made for the variables which Chong has said he had already taken into account. As for the coastal highway having

A little impact on Zara Land because of an existing access, Chong said that Zara Project cannot at all succeed if the coastal highway is not built since the existing road is not wide enough to cater for such a project. The insufficiency of the Likas Road has already been commented upon by me earlier and what I said provides the answer to this complaint. I turn to Reason 4 which concerns the Tambalang Race Course project which was B used by Chong for comparison to the Tower project. For ease of reference, I reproduce what New said is the flaw in such an approach, viz:

> (a) There was already improved access from Tuaran Road and market recognition of tourism potential resulting in a speculative market and, therefore, the enhancement cannot be attributed solely to race course. C Furthermore, despite the closure of the race course in 1984 yet there was the biggest value increase in 1985 and 1986;
>
> (b) The race course cannot be compared to an office building because the race course is in a relatively remote and undeveloped area which provided hope for development where there was previously almost none whereas the Tower is situated at the most valuable and accessible site and D therefore did not gain from such hope which it would had the Tower been situated at a remote area of Zara Land;

In answer, Chong explained that the race course was the only major project around that time that bore comparison to the massive project of the Tower. Though the sports complex project was another massive development at E that time, it was not chosen for comparison because it was located in Likas which was already a matured development area while the race course area was not. Again, I would prefer the opinion of Chong. He explained plausibly that the access road from Tuaran town to the race course, despite improvement already made, was winding and narrow and passed through kampungs which made access to the race course difficult and thus the race F course was a failure. He said that way back in the 1980's there was hardly any market reaction to tourism and that it was not till the 1990's that there were tourism related activities there and even then the land price was low. As for 'the hope of development' mentioned in New's reason, above, which he argued was not gained in the case of Zara Land because the Tower was G located at the most accessible part of Zara Land, Chong explained that the development of the Tower would still benefit the rest of Zara Land notwithstanding the restriction the Tower may have on the development of the rest of Zara Land because this was already planned and anticipated by the proponents of Zara Project. The Tower, he continued to explain, will attract people and thus bring with it commercial activities. That, in my H view, explains that the development of the race course and that of the Tower carried the same hope of attending development. I turn now to Reason 5 which complains of various adjustments not having been made. Chong, as I have mentioned earlier, has explained that adjustments are made whenever you adopt the comparison method which method he had used. Therefore, there is no question of adjustments not having been made. He I was aware that the development of Zara Land would take at most 20 years as stipulated in the title and that in ten years time, the development would have reached the central part of Zara Land. There were many other factors which went towards his decision and he had been extensively cross-examined on them and I found his explanation acceptable. It is not possible to set out all those facts and explanations which evidence runs into thirty-seven pages apart from the numerous pages of his written opinion. In accepting Chong's opinion, I have weighed it against that of New and I have dealt principally with those complaints deserving of specific mention and I have given, above, my reasons for rejecting the opinion of New.

In the end I accept Chong's opinion that the enhancement factor to Zara Property consequent upon the construction of the Tower was 17% and that consequent upon the construction of the coastal highway was 25%. I am of the view that New completely underestimated the benefits that can be derived from having the coastal highway and the Tower. His insistence that it was not necessary for the coastal highway when the obvious was the case since the success of Zara Project depended on it underscores his tendency to downplay or to exaggerate if it suits his clients. Though the coastal highway was unarguably of vital importance to Zara Project yet you find him downplaying its importance by saying it has none. He exaggerated in the land compensation case when he gave the opinion that the compensation should be RM92m, a figure that was grossly inflated as can be seen from the fact that the court awarded not even half of that and Zara was happy as not to appeal. As against that, we have the evidence of Chong who said that the Tower would attract the flow of people and that the Tower, since it was intended to be owner-occupied, would not be a competitor for other office buildings to be erected on Zara Land. In fact, it has the beneficial effect of locating some 1,000 employees of the Sabah Foundation there and these people naturally would like to live near their place of work and so enhance residential property demand on Zara Land while also enhancing commercial activities. As for the coastal highway, he said without it Zara Project would be a complete failure a conclusion that is supported by the plans put up by the experts employed by Zara which extolled the benefit and importance of the coastal highway. That about summarises what Chong had said in many pages of evidence that I accept.

YS-ITM Campus

There is another factor which was urged as being an enhancing factor to Zara Land and that is the YS-ITM campus. On 16 November 1972 DSK as the director of Sabah Foundation applied on behalf of a subsidiary company of the Sabah Foundation for 1,780 acres of land at the Menggatal Forest Area which was east of Zara Land and separated from Zara Land by the Menggatal River. The purpose was for a controlled future development of the land for the benefit of the natives (bumiputras) and the beneficiaries of a trust that was to be set up. This was approved on 28 December 1972. Fronting the Menggatal River is a swampy stretch and other alienated land totaling about 780 acres which was also applied for on 19 April 1973 for the establishment of the YS-ITM campus. This exercise involved the acquisition under the Land Acquisition Ordinance of about 480 acres. The application and the suggestion made by DSK for the acquisition were approved. This was followed by another application for an additional 400 acres which was approved on 22 May 1973 bringing the total to 1,180 acres. Seven hundred and fifty acres were earmarked for the campus. Chong was of the view that this campus, after taking into account the negative factors, contributed an enhancement factor of 6% though he did not do any case study. He said that the campus was already in use in 1975 and had a population of 600 which rose to 4,000 four years later requiring the authority concerned to buy over large number of houses in neighbouring housing estates thus showing the spill-over effect in the demand in housing. The students and staff will be ever increasing and the availability of facilities on Zara Land will attract these people. Those were the reasons for saying that the campus had an enhancing effect on Zara Land. New disagreed and he said that the new housing was only established in 1998 and was the consequence of the Sepangar Bay Road and not the result of the campus. He added that the campus would be self-contained and Zara Land could not have attracted the residents of the campus since the two lands were physically separated with no road or bridge to connect them. I am inclined to agree with New not only for the reasons that he had stated but also because there is no comparison exercise done by Chong as he had done in relation to the coastal highway and the Tower. Chong's reasoning is just a summation with no statistic to support.

Furthermore, I am of the view that the idea of siting the campus there came from Tan Sri Arshad Bin Syub who was the then director of Mara Institute in Selangor and who so testified. He was not really tested by cross-examination and I can find no valid reason not to accept his evidence.

I turn now to consider the law governing the facts as I have found and which I will have to find in the course of considering the law.

The Law

What I have said in Suit 352 in relation to the law governing a fiduciary is no less applicable to this case. I do not propose to repeat them here. DSK apart from being a fiduciary of Sabah Foundation and Seranum was also a fiduciary of Sinsuran. As in Suit 352, if the court finds DSK to be liable, Zara would be equally liable for the reason that DSK is Zara's directing mind and will. From the manner in which both learned counsel had argued the issues it appears to me that the question of whether DSK had acquired and used the opportunity and knowledge while a fiduciary had been subsumed in the following issues as to make the answers to the following questions decisive, viz:

(1) Whether DSK was in a position in which his interests were in actual or potential conflict with those of Sabah Foundation or its subsidiaries;

(2) Whether DSK had a collateral motive which was: (a) improper; and (b) dominant;

(3) Whether DSK had secured informed consent; and

(4) Whether DSK was dishonest.

Conflict A

In this case, it is not difficult to see that DSK was in a position where his duty to Sabah Foundation, Seranum and Sinsuran conflicted with his interest in Zara. On the one hand he has to protect and promote the interest of Zara by making sure that whatever actions to be taken on behalf of the Sabah Foundation and its subsidiaries must benefit Zara while on the other B hand he must also act to protect the interest of Sabah Foundation or its subsidiaries to ensure that their interests are protected and promoted. Thus, in deciding whether to build and site the Tower on Zara Land, various considerations must be taken into account like its cost and viability. The conflict will arise where the project even though it is not viable or where it was beyond their financial means, nevertheless went ahead because the C Tower will serve as a magnate, and thus, a boom, for Zara Land. It is the same for the coastal highway where DSK would face the same conflict. I do not see how it can be argued that DSK was not in any position of conflict.

Collateral motive D

As regards the motive for construction of the Tower and the coastal highway, I must bear in mind that all investments involve risk and imprudence is not dishonesty (*Royal Brunei Airlines Sdn Bhd v Tan* at p 389). Therefore, the fact that the investments were afterwards found not to be sound does not per se mean that it was for an improper motive. Sabah Foundation started out with charitable objectives and involved itself later on E in commercial enterprises in order to garner income. Therefore, not unexpectedly, when considering matters where the Sabah Foundation is involved, not purely commercial factors, like viability or profitability, are taken into account but its charitable purpose also. Since Sabah Foundation is a charitable organisation and given the fact that funding of its activities, seemed limitless at that time, being just a TM's stroke of a pen away (by the F granting to it of timber concessions) or just a suggestion away from DSK, it is not unthinkable that a prestigious building, like the Tower, could be thought of and built without regard for its funding or viability. What more, when Sabah Foundation had so many subsidiaries requiring office space. Therefore, the decision to have the Tower built, alone is not evidence of any G improper motive. In this regard I am prepared to accept the evidence of Chong that there is no general market for such office space and so a consideration of lettability may not be appropriate. Though the two projects being planned after the conception of Zara Project and they benefited Zara Project may raise suspicion as to the real motive behind such a project, I am not inclined to conclude on mere suspicion that the dominant purpose of H the two projects was to benefit Zara. Hindsight is now available for all to see that Sabah for a while boasted and took pride that it had the only kind of structure in this region. With such a building, you need also a road access like the coastal highway which again, in my view, was not constructed for the dominant purposes of Zara. Unless the two projects were so totally useless or near totally useless, I am unable to infer the dominant improper I motive urged by Mr Mann QC. There is just not enough evidence for me to draw such a conclusion.

A *Informed consent*

It is common ground that there was no informed consent for DSK.

Dishonesty

B Mr Mann QC with regard to the question of dishonesty had urged the inference that DSK was dishonest upon the following facts or circumstances:

(1) DSK did not secure the informed consent of the Board of Trustees;

(2) DSK's intelligence, his professional qualification of barrister and the absence of any evidence of need for a 30-floor building or of any certainty that vacant space could be let; C

(3) Non-disclosure of his interest in Zara in any official paper, and the absence of any evidence that he made disclosure to anyone not personally involved with him in the project;

D (4) DSK committing Sabah Foundation to expenditure when it could not even expect to be able to cover the expenditure on the sports complexes and stadium;

(5) The need for a prestigious focus for the Zara Project;

(6) Inferentially probable that DSK had blatantly disregarded his fiduciary duties; and

E (7) DSK knew the danger of his interests conflicting with those of YS and the subsidiaries and his corresponding duty of disclosure.

It should be borne in mind that at the relevant time obtaining fund for the purposes of Sabah Foundation was a matter of a mere nod from TM and then you would have access to miles of timber land for extraction of timber F for sales from which fund would be obtained. Therefore, the idea of Sabah Foundation being able to generate fund itself other than through TM granting it timber concessions could not have been further from anyone's mind. Therefore, that the viability of the Tower was not considered at all is only evidence that it was not a matter of consequence to anyone at that time G since Sabah Foundation appeared to have an unending flow of fund for its activities as long as TM agreed. At most it was imprudence. Though the Tower was intended to be a magnet to draw either business or people to Zara Land it was also intended to be a prestigious project for Sabah Foundation and also to provide space for its subsidiaries. As it was not entirely, though predominantly, for the purpose of Zara, I am not inclined H to hold that it was evidence of dishonesty on that account. The fact that DSK was a barrister, that he did not secure informed consent, that he did not disclose his interest in Zara and that he knew of the conflict of interest is nothing more than elements that went towards establishing a breach of fiduciary duty. These are not evidence of dishonesty. That DSK is a barrister is neither here nor there because he is not expected to know every I law. Furthermore, at the relevant time he was not concerned with the practice of law and there is no evidence that he had ignored advice that there could be a breach of fiduciary duty if he persisted in the conduct that is complained of. Furthermore, this is not a branch of the law that every lawyer is familiar with. The need to engage QCs which the court approved is proof of that. Unlike Suit 352, this is not a case where DSK proceeded to deprive anyone of any property. From the evidence, I cannot say that DSK had so completely disregarded the interest of Sabah Foundation and its subsidiaries that his conduct can be described as dishonest. It is just that it suited more of the purposes of Zara to have the Tower and the coastal highway built and DSK being in a position of conflict as he was rendered his decisions a breach of his fiduciary duties.

What DSK had done was to so entangle himself in a ball of conflicts where every decision he made with regard to Zara and with regard to the Sabah Foundation was fraught with the impossible task of balancing their respective interests. The only way he could extricate himself was to obtain the informed consent of the Board of Trustees which he did not. However, that he did not does not mean he was fraudulent or dishonest but was rather the result of being put in several positions of such power that he was synonymous with TM. Given such a situation it is, in my view, not difficult to see that to DSK everyone, save for TM, seemed insignificant and hence obtaining consent from the Board of Trustees did not cross his mind at all. The plaintiffs have not established that the contrary was the case. Even in the case of TM, DSK would have in his manipulative way got his endorsement for decisions DSK had already taken.

Other issues

Attempts had been made by Seranum to include claim for the cost of the construction of the coastal highway which Mr Cherryman QC argued as not having been pleaded it being a claim for special damages, with which contention I agree. Therefore, I will not award anything by way of special damages. This leaves the question of quantum in respect of the breach of fiduciary duty.

Damages

Since there is no dishonesty and the improper dominant motive had not been proven, the appropriate remedy in this case would be the disgorgement of the profit and that is the value of the improvement to Zara Land. Though Chong had given the improvement in both monetary and percentage terms, I have already expressed my unhappiness as to whether the proper adjustments had been made when he arrived at those figures. Chong did not elaborate on how he had made adjustments. I cannot simply accept his statement that he had without this witness demonstrating how he had. That there was overlapping is clear. Take for example, the presence of the Tower as being an enhancement factor. The mere presence of the Tower would not be sufficient to enhance the Zara Land unless there is also access to the Tower. Therefore, when you say that the Tower enhanced the value of Zara Land, it must necessarily have taken into account accessibility to the Tower and this means having taken into account the coastal highway. It has a cumulative rather than a separate effect in the context of this case.

A Therefore, the enhancement made by the coastal highway should merge with the enhancement made by the Tower. This means I will only take the enhancement factor of 25.35% as being contributed by both the Tower and the coastal highway. This means the profit would be the sum of RM10,375,504 which is the sum which the defendants have to disgorge. Therefore, there will be judgment for the plaintiffs (Sabah Foundation, B Sinsuran and Seranum) jointly and severally against the defendants (DSK and Zara) for the sum of RM10,375,504 together with costs. I will hear the parties further as to the interest to be awarded.

Other matters

C An attempt was made to prove damages other than those pleaded. In this regard I am in agreement with Mr Cherryman QC that the court should not be concerned with what Sinsuran had lost with respect to the construction of shophouses to finance the sports complexes and stadium nor with the special damages of Seranum which are not pleaded. It was also sought to D establish that certain entities are actually the beneficiaries of certain shares in certain companies which I am of the view is not proper for the court to decide on as not all the entities concerned were before the court and also because it is only relevant to execution. Therefore, I do not wish to comment on it

In the autobiography called *The Education of Henry Adams*, at p 191, a E Mr John Bright then a member of the British Cabinet was reported to have said the following in 1880 when the subject of the then judges' opposition to the reform of the criminal law was mentioned, viz:

> For two hundred years, the Judges of England sat on the Bench, condemning to the penalty of death every man, woman, and child who stole property to the F value of five shillings; and during all that time, not one Judge ever remonstrated against the law … .

That statement thoroughly condemned the judges for not speaking out when they should. With that in mind, I will comment on certain of the events not only because judges have a duty to speak when the occasion G arises but also because I wish to dispel the notion which learned counsel may hold that I am skirting the issue by not mentioning the fact that DSK was from West Malaysia, a fact mentioned by the plaintiffs. Yes, DSK was from West Malaysia sent to Sabah supposedly to help Sabah politically. Unfortunately, he had introduced to Sabah, especially to the then politicians of Sabah, a way to get rich, very rich at that, quickly by ways H which I have already concluded are wrong in law. It is no wonder that Sabah was tagged 'The Wild Wild West of Malaysia' and I am inclined to say that some of the pioneers of this wild frontier are featured in this case. However, it is important to stress that there are many West Malaysians who had contributed to Sabah. Take this case for example, it was Mr Ali Bin Abdul Kadir, a West Malaysian, then a very young accountant (but now the I Chairman of the Securities Commission) who investigated this case which laid the foundation for the initiation of these two cases. There is yet another West Malaysian in the person of Tengku Adlin who testified in this case and he was the pioneer sent from West Malaysia to help establish the Sabah Housing Commission which built many many houses for the low-income group in Sabah. It is important, whatever your view may be of DSK, to bear in mind that other West Malaysians in Sabah did not behave the way DSK did. Even DSK, it must not be forgotten, had contributed tremendously to Sabah having pioneered Sabah Foundation which had distributed scholarships, school uniforms, text books, shoes and milk to the poor and even to the not so poor and who was responsible for bringing higher education to the shore of Sabah. Therefore, though the introduction to Sabah by DSK of this get-rich scheme for politicians must be condemned it must always be remembered that West Malaysians have contributed immensely to Sabah, including DSK. Another thing must be said.

It is very unfortunate that these two cases were tried more than two decades after the suits were filed. Courts interpret the law and in that process set the standard, like for example, the standard of behavior for politicians who hold public offices. If the conduct was wrong, as in this case, the court should have said so twenty years ago and saying it today may be a bit late if in the meantime such improper conduct is followed by other politicians because it was not yet condemned as being improper since these two cases had not been tried yet. This is a good example of how important it is that justice be not delayed.

These two cases involved thousands and thousands of documents which would have made searching and reading them immensely difficult had it not been for the masterful way that learned counsel, Mr Mann QC and Mr Cherryman QC, had set them. In the end access to them became a breeze despite the numerous folders which contained them. Both learned counsel had also expertly led me through the evidence both oral and documentary and highlighted the issues and gave their arguments which make my decision possible. I wish to record my appreciation to these two gentlemen of the Bar.

Plaintiffs' claims allowed.

Reported by Jafisah Jaafar